Supreme Court, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1315

No. 85-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WARREN KOSHER and CHRISTINE KOSHER,

Petitioners,

—v.—

TIMMY STAMATIS and LISA STAMATIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

MARTIN GUGGENHEIM
(Counsel of Record)
New York University School of Law
715 Broadway
New York, New York 10003
(212) 505-7400

KATHERINE G. THOMPSON
JOHN E. HALPIN
ELIZABETH M. BARNETT
Sherman Thompson and Halpin
19 West 44th Street
New York, New York 10036
(212) 704-0350

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. May New York terminate the parent-child relationship without a showing of unfitness, abandonment or a knowing and intelligent waiver of parental rights?

2. May New York terminate the parent-child relationship on a theory of waiver when the undisturbed findings of fact are that the parents did not intend to waive their parental rights?

3. Whether natural parents who claim that signing a consent to adopt their child was constitutionally defective have standing to challenge the validity of the consent when, for good cause, they failed to attempt to revoke it within the statutory period for revocation?

THE PARTIES

The parties to this proceeding are listed in the caption. The Attorney General of the State of New York has appeared below pro se in support of the constitutionality of New York's statute.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. i

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS . . 1

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISION INVOLVED 3

STATUTE INVOLVED 4

STATEMENT OF THE CASE. 4

REASONS FOR GRANTING THE WRIT. . . . 21

I.

BEFORE PARENTAL RIGHTS MAY BE DESTROYED PERMANENTLY, THERE MUST BE A CLEAR SHOWING OF A KNOWING AND INTELLIGENT WAIVER. WAIVER OF BASIC CONSTITUTIONAL RIGHTS MAY NOT BE INFERRED FROM A SILENT RECORD. 25

II.

BEFORE PARENTAL RIGHTS MAY BE PERMANENTLY DESTROYED ON THE BASIS OF PARENTAL CONSENT, THERE MUST BE A FACTUAL SHOWING THAT THE PARENTS HAVE WAIVED THEIR RIGHTS. 38

CONCLUSION 41

APPENDIX A-1

Opinion of the New York
Court of Appeals A-1

Opinion of the Supreme Court,
Appellate Division, Second
Department A-45

Order of the Supreme Court,
Appellate Division, Second
Department A-104

Opinion of the Family Court,
Suffolk County on Revocation . . . A-109

Opinion of the Family Court,
Suffolk County on
Best Interests A-169

Final Order of the New York
Court of Appeals A-205

New York Domestic Relations Law
Section 115-b. A-207

TABLE OF AUTHORITIES

	Pages
CONSTITUTION:	
U.S. Const. amend. XIV	passim
FEDERAL STATUTES:	
28 U.S.C. § 1257(3).	3, 21
NEW YORK STATUTES:	
New York Domestic Relations Law § 115-b et seq	passim
CASES:	
Armstrong v. Manzo, 380 U.S. 545 (1965).	23
Baker v. Carr, 369 U.S. 186 (1962).	26
Blackburn v. Alabama, 361 U.S. 1 (1966).	32
Brookhart v. Janis, 384 U.S. 1 (1966).	32
Brown v. Allen, 344 U.S. 443 (1953).	32
Fuentes v. Shevin, 407 U.S. 67 (1972)	33
Johnson v. Zerbst, 304 U.S. 458 (1938).	33, 35
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	23

Lawrence v. State Tax
Commission, 286 U.S.
276 (1932) 27

Lehr v. Robertson,
463 U.S. 248 (1983). 23, 31

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1892). 28

Lovell v. City of Griffin,
303 U.S. 444 (1938). 28

Matter of Daniel C.,
99 A.D. 2d 35, 472 N.Y.S.
2d 572 (2dDept. 1984);
aff'd, 63 N.Y. 2d 927,
483 N.Y.S. 2d 679 (1984) . . . 37

Miller v. Fenton,
106 S.Ct. 445 (1985) 32

Santosky v. Kramer,
455 U.S. 745 (1982). 23, 33

Stanley v. Illinois,
405 U.S. 645 (1972). 33

Thomas v. Arn,
106 S.Ct. 466 (1985). 28

Wainwright v. Sykes,
433 U.S. 72 (1977) 34

MISCELLANEOUS:

Note, The Constitutional
Rights of Natural Parents
Under New York's Adoption
Statutes, 12 N.Y.U. Rev. L.
Soc. Change 617 (1983-84). . . . 35

No. 85 - ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WARREN KOSHER AND CHRISTINE KOSHER,

Petitioners,

v.

TIMMY STAMATIS AND LISA STAMATIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioners Warren Kosher and Christine Kosher respectfully pray that a writ of certiorari issue to review the judgment of the New York Court of Appeals, entered on November 14, 1985, which reversed an order of the Supreme Court of the State of New York, Appellate Division, and overruled petitioners'

constitutional challenge to the adoption of their daughter by respondents.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 66 N.Y.2d 223, ___ N.Y.S.2d ___ (1985) and is set forth in Petitioners' Appendix at pp. A-1 through A-44. The opinion of the Appellate Division of the Supreme Court is reported at 110 A.D.2d 18, 492 N.Y.S.2d. 957 (2d Dept. 1985) and is set forth in Petitioners' Appendix at A-45 through A-103. The two opinions of the Family Court, Suffolk County are not officially reported and are set forth in Petitioners' Appendix at A-109 through A-204.

JURISDICTION

The judgment of the New York Court of Appeals was entered on November 14, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT IV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

STATUTE INVOLVED

New York Domestic Relations Law §115-b (McKinney 1980) (Special Provisions Relating to Consents in Private-Placement Adoptions). The statute is set out in full in Petitioners' Appendix at A-207 to A-216.

STATEMENT OF THE CASE

This case raises fundamental questions about the constitutional prerequisites for an effective parental waiver of the due process right to the care, custody and companionship of one's child. Petitioners in this case are wholly fit parents: there has never been any suggestion that they were in any way

neglectful or inadequate parents. Their parental rights were permanently terminated on the basis of their waiver of parental rights. But that waiver was not made in a knowing and intelligent manner.

Under New York law, a parent may voluntarily and permanently surrender parental rights to permit a private placement adoption in either of two ways: in court before a judge, New York Domestic Relations Law §115-b(1)(c) (hereinafter "judicial consent"); or out of court, New York Domestic Relations Law §115-b(1)(d) (hereinafter "extra-judicial consent").[1]

---

1. All subsequent references to New York statutes will be to the New York Domestic Relations Law. For convenience, the references will cite simply to the section number.

When there is a judicial consent, the parent must appear before a judge of the court in which the adoption proceeding is to take place and be advised fully of the nature and meaning of the consent. §115-b(2). Once a judicial waiver is effected, it is irrevocable. §115-b(1)(c).

The extra-judicial consent process is accomplished by the parent's signing a consent form. The signing of this form also operates as a waiver of the parent's fundamental liberty interest. But unlike the judicial consent process, the consent form wholly fails to explain the nature and import of the waiver of parental rights. Moreover, parents who sign it are given the false impression that their consent is tentative and reversible by their own deeds.

An extra-judicial consent is partly revocable under certain circumstances. By the language of the statute, a parent may revoke an extra-judicial consent within thirty days of the filing of the adoption petition. §115-b(1)(d)(i). But the revocation is sharply limited. Once a parent has revoked an extra-judicial consent, the parent has only the right to contest the custody of his or her child in a best interests hearing. §115-b(1)(d)(ii). Signing the extra-judicial consent form delegates authority to the pre-adoptive parents. If the pre-adoptive parents oppose the revocation and continue to seek to adopt the child, the natural parent "shall have no right superior to that of the adoptive parents". §115-b(3)(d)(v). If the court finds, after a hearing, that the best

interests of the child are served by permitting the adoption, parental rights must be permanently severed and "the court shall dispose of the custody of the child as if no notice of revocation has been given by the parent." §115-b(3)(d)(iv).

By the terms of the statute, the extra-judicial consent forms need not indicate the full import of signing the forms. The official forms utilized in New York pursuant to statute -- and the form actually used in this case and signed by petitioners -- omit material information and are grossly misleading. The form blithely states that a parent may revoke his consent by filing a notice within thirty days of the commencement of an adoption proceeding. The form fails to tell the parent that the revocation

provides the parent only with very limited rights and that signing the extra-judicial consent subjects the parent at that moment to an irrevocable loss of substantive rights. Once a parent signs an extra-judicial consent, the parent loses the absolute right to the care and custody of his or her child; the parent's rights thereafter are conditional, predicated upon the position on custody which the pre-adoptive parents may take and further predicated upon a demonstration that the return of custody is in the child's best interests. Thus, once a parent signs the form, the parent, in effect, has given up irrevocably the substantive parental rights which all other parents enjoy as a matter of New York (and federal constitutional) substantive law.

The petitioners in this case are the natural parents of Sarah, who was born with Down's Syndrome on November 6, 1983. Shortly after the Sarah's birth, the obstetrician entered the recovery room and announced his belief that "the baby is a mongoloid." While the mother was still in the hospital, petitioners arranged to have their daughter placed in a pre-adoptive home. (This placement was arranged through the efforts of a woman recommended to the parents by a social worker at the hospital.) The mother left the hospital on November 7. On November 11, the child left the hospital and was given to respondents' lawyer, David Verplank, who placed her with respondents on that date. Petitioners' daughter has lived continuously with respondents since November 11, 1983.

On November 11, Mr. Verplank, the respondents' attorney, brought to the hospital two adoption consent forms which he had drafted. He gave these forms to a friend of petitioners who, in turn, gave them to petitioners.[2] When petitioners received the forms, they were told "these were the papers that had to be signed." (R. 186)[3] Mr. Verplank, the drafter of the forms, testified that, in adoption proceedings, he always has the parents "sign the two forms" because "[t]he Court

---

2. The friend, Bruce Regenstreich, is a law partner of petitioner Warren Kosher. However, Mr. Regenstreich has no knowledge of adoption law and acted on petitioners' behalf solely as their friend, not as their lawyer. (A-71) Warren Kosher is a former assistant district attorney with no knowledge of or familiarity with adoption law. (A-112; A-145)

3. Citations to the transcript of proceedings in the Family Court are designated "(R. ___)" as numbered in the Record on Appeal in the Court of Appeals.

would not accept [the adoption petition] or give [the petition] a filing date unless both are submitted at the time the petition is filed." (R. 616)

Two weeks later, on November 26 or 27, petitioners signed both consent forms. These documents form the basis for the litigation that followed and are set out in full at pages A-6 - A-9 of Petitioners' Appendix as part of the opinion of the New York Court of Appeals. One form was a judicial consent and the second form was an extra-judicial consent. The trial court made a finding of fact, which was never overturned on appeal, that petitioners believed at the time they signed the documents that nothing would be final until petitioners appeared in court before a judge. The Family Court judge specifically found

that petitioners "believed that their written adoption consent was 'tentative'"; (A-161) that "(t)hey were waiting for their Court date"; (A-162) and "that they believed they were able to revoke their consent at any time prior to their appearance before the Court." (A-163 - A-164)

These beliefs were eminently well-founded. The judicial consent form contained a jurat which requires a personal appearance and acknowledgment before a judge. It is clear from the face of that form that it may be executed only by appearing personally before a judge. The extra-judicial consent form stated that

> in the event that Consent is not executed before a Judge . . . then and in that event this Consent shall become irrevocable thirty days after

> the commencement of the adoption proceeding unless written notice of revocation

is filed with the court.[4] Between November 27, 1983 and late January, 1984, petitioners waited for notice of the scheduled appearance in Family Court.

On December 19, 1983, respondents commenced the adoption proceeding. Neither the Family Court nor Mr. Verplank informed petitioners that the proceeding had been commenced or that petitioners had to act by a specific date in order to revoke their extra-judicial consent. On January 23, 1984, petitioners received the only notice they were ever given in

---

4. It is important to observe the absence of any modifier before the first word "consent" in the sentence. Since petitioners intended and expected to appear before a judge, they had no reason to believe that the clock was running against them. (A-74)

this matter. The notice merely informed them that a hearing had been scheduled for them to appear on March 1, 1984. The notice read:

> Please be advised that the above captioned matter has been scheduled for a preliminary hearing on the 1st day of March, 1984 at 10:00 a.m. at which time you are to be present . . .

(Ex. 15)

Between January 23 and March 1, petitioners struggled within themselves whether to consent to their daughter's adoption on March 1 or to raise her themselves. (A-10 - A-11) On February 28, petitioners decided firmly that they wished to raise Sarah themselves. Petitioners communicated this information to the Family Court Clerk, who told them that a revocation of consent document would have to be filed with the court.

The March 1 hearing date was cancelled. The revocation of consent form was executed on February 29 and mailed to the court, which received the form on March 2.

Respondents opposed the child's return to petitioners and the Family Court held a hearing to determine the validity of their initial consent and/or its revocation. Petitioners challenged the validity of their consent on a number of grounds. For purposes of this petition, the relevant grounds were: (i) the consent was constitutionally invalid because it was not signed knowingly and intelligently; (ii) the statute authorizing extra-judicial consents, and the forms used pursuant to it, are unconstitutional as violative of due process of law; and (iii) the failure to

notify parents of the commencement of the adoption proceeding and of the actual time for revoking their consent violates due process of law. (A-148)

The Family Court judge, after a hearing, agreed with one aspect of petitioners' contention that they had been denied their constitutional rights to due process. The court ruled that petitioners reasonably believed that they had until March 1, 1984 to revoke their consent. But it held that this belief only entitled them to be heard as if their revocation had taken place within the requisite statutory time period. (A-165) Accordingly, the Family Court gave petitioners the limited statutory right of presenting evidence in a best interests hearing to determine Sarah's custody.

Following that hearing, the Family Court on November 7, 1984 ruled that petitioners' daughter's best interests would be served by adoption by respondents. Consistent with the statute, the Family Court awarded permanent custody of Sarah to respondents "as if no notice of revocation ha[d] been given by the parent." §115-b(3)(d)(iv).

The Order of the Family Court was reversed by the Appellate Division. (A-45 - A-103) Four members of the five-justice Appellate Division concluded that constitutional defects in the adoption process invalidated the adoption, although they reached this conclusion in different ways. Two justices found the statute unconstitutional on its face. Two justices, without addressing the facial validity of the statute, concluded

that the particular consent forms signed by petitioners misled them and violated due process of law. Finally, one justice dissented and voted to affirm the Family Court order: although finding that petitioners were misled as to the time within which they were entitle to revoke, this justice concluded that petitioners had already received adequate relief in the form of a best interests hearing.

On November 14, 1985, the Court of Appeals reversed the Appellate Division order and directed the adoption of the child to go forward. (A-1 - A-44) This result, however, flowed from an opinion that actually upheld the merits of petitioners' constitutional challenges to the adoption process used in their case. The Court of Appeals agreed with petitioners' primary contention that the

forms utilized in this case (and regularly used in other cases, pursuant to statute), violate basic notions of fairness and notice. Broadly construing the statute so as to uphold its constitutionality, the court incorporated these fairness and notice requirements in the statute: section 115-b, the court ruled, requires that extra-judicial consent forms advise "parents of the effect of their act, so that they are fully informed of their limited rights in the event they choose to make timely revocation." (A-30)

Having resolved all of these issues in petitioners' favor, the Court of Appeals nevertheless refused to grant relief in this case. The Court of Appeals held that petitioners lacked standing to challenge the infirmities in

the statute and forms as applied to them because they failed to revoke their consent timely. (A-35 - A-43) The court's ruling on the necessary revisions of the extra-judicial consent forms was prospective only, and petitioners were denied any benefits of that ruling.

Petitioners timely filed this petition for certiorari pursuant to 28 U.S.C. §1257(3).

REASONS FOR GRANTING THE WRIT

This case poses an important constitutional question never before squarely confronted by this Court: What satisfies a showing of waiver of parental rights in a non-state-initiated adoption case? Petitioners do not challenge New York's substantive standard for termination of parental rights in a

private placement context. Rather, petitioners challenge the New York procedure's failure to appraise them at a meaningful time of the significance of their conduct.[5]

Given the deeply protected nature of the parent-child relationship, it is clear that some showing must be made that petitioners knowingly and intelligently waived their constitutional rights to the care, custody and companionship of their children. Although this Court has ruled on innumerable occasions that there are minimum standards for waiving fundamental constitutional rights, this Court has never before addressed the means for

---

5. The Court of Appeals considered petitioners' challenge to be to "the statute, the forms, or both." (A-22, n.4) For convenience, petitioners will refer to the defects as existing in the forms.

applying such standards to a non-state-initiated adoption case.

In Lassiter v. Department of Social Services, 452 U.S. 18 (1981) and Santosky v. Kramer, 455 U.S. 458 (1982), this Court clarified the procedural safeguards which must accompany a state-initiated attempt to sever a parent-child relationship. In Armstrong v. Manzo, 380 U.S. 545 (1965) and, most recently, Lehr v. Robertson, 463 U.S. 248 (1983) this Court has determined when and how parents must be notified of the pendency of a private adoption proceeding. This case provides the Court with an opportunity to clarify what process is due when a parent disputes the validity of a waiver of parental rights in such cases.

In this case, the Court of Appeals terminated petitioners' parental rights

without any showing in the record that petitioners knowingly and intelligently waived their parental rights. Although couching its ruling in terms of standing, the Court of Appeals actually held that petitioners waived their statutory right to revoke an extra-judicial consent to adoption. The waiver was a procedural default: petitioners failed to act within thirty days of notification of the pending adoption proceeding. This appellate finding of waiver also was without any showing of a knowing and intelligent act.

Not only was there no showing of a knowing waiver in the record, but the courts found unanimously that petitioners did not knowingly waive their rights. Characterizing petitioners' actions merely as a "mistake", the Court of

Appeals erroneously permitted the destruction of basic constitutional rights where it is plain that those rights were not waived in accordance with long-standing decisions of this Court.

I.
BEFORE PARENTAL RIGHTS MAY BE DESTROYED PERMANENTLY, THERE MUST BE A CLEAR SHOWING OF A KNOWING AND INTELLIGENT WAIVER. WAIVER OF BASIC CONSTITUTIONAL RIGHTS MAY NOT BE INFERRED FROM A SILENT RECORD.

The Court of Appeals decision in this case conflicts directly with a long line of cases concerning waiver of constitutional rights. Although the Court of Appeals ruled against petitioners on grounds of standing, it is clear that the opinion mischaracterized its reasoning. Properly understood, the decision below was based on a finding that petitioners waived their rights to

the care, custody and companionship of their daughter.

Throughout the litigation in the New York courts, petitioners challenged the validity of the initial consent they signed. Petitioners have claimed from the very first time they appeared in Family Court that the extra-judicial consent form was not signed knowingly and intelligently and, therefore, could not be given any legal effect. Nothing could be clearer than that petitioners have standing to make this challenge. Baker v. Carr, 369 U.S. 186 (1962).

Although the Court of Appeals mislabeled its holding in terms of standing, the court actually held that petitioners were barred from being heard on the merits of their claim because of a procedural defect. The Court of Appeals

ruled that since petitioners did not revoke their consent within the thirty days which the statute allowed, therefore they would not be permitted to argue that the consent was constitutionally flawed. (A-42 - A-43)

The Court of Appeals in essence ruled that petitioners' failure to notify the court within thirty days of notice of the adoption proceeding operates as an adequate non-federal ground barring petitioners from being heard on their federal claim. In such circumstances, "it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not thus be avoided." Lawrence v. State Tax Commission, 286 U.S. 276, 282 (1932). Whether an alleged

failure to comply with state procedural rules bars a federal court from reaching the merits of a federal claim is, of course, itself a federal question. See Lovell v. City of Griffin, 303 U.S. 444, 450 (1938).

There can be no dispute that "the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural rule." Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982). This is as true for state-created interests as it is for constitutional rights. However, this is not a case in which petitioners were "notified in unambiguous terms of the consequences of the failure to [revoke] and deliberately fail[ed] to [revoke] nonetheless." Thomas v. Arn, 106 S.Ct. 466, 475 (1985).

To the contrary, petitioners never knew or believed that they had to revoke anything in writing because they believed that they were scheduled to appear before a judge and that they would have the opportunity at the time either to give consent to the adoption or demand the return of their child. The Family Court specifically found their belief to be "well validated". (A-161) Thus, what the New York Court of Appeals classified as a failure to "timely" revoke the consent in fact was not a knowing and intelligent waiver of constitutional rights.[6]

---

6. The issue of timeliness itself is peculiar in this case. By the terms of the statute, petitioners were required to revoke within thirty days of the filing of the adoption proceeding. That occurred on December 19, 1983. However, petitioners did not receive notice of any kind until January 23, 1984. The Court of Appeals ruled that petitioners would be deemed to have until February 23, to revoke. (A-37) Since petitioners did not

Petitioners' failure to revoke within thirty days of January 23 is easily explainable. First, the "notice" they received on January 23 told them to appear in court on March 1. The notice said, "Please be advised that the above captioned matter has been scheduled for a preliminary hearing on the 1st day of March, 1984 at 10:00 a.m. at which time you are to be present." (Ex. 15) The notice did not say "an adoption proceeding has been filed and you have thirty days within which to revoke your consent." Nor was it possible to glean

---

revoke until February 29, they were six days late and were deemed to be time-barred from complaining about the defects in the original consent. However, as of January 23, 1984 when petitioners received the notice from the court to appear on March 1, they were already barred by the terms of the statute from revoking.

that message from the wording of the notice. This was the only "notice" of any kind which petitioners ever received.[7]

Second, petitioners never knew or believed that they had signed something which had to be revoked in writing. Petitioners signed a form -- the judicial consent -- which, by its terms, plainly revealed that they had to appear in court. They were waiting to go to court and never had any knowledge that the clock was running against them.

Although a finding of waiver is partially a question of fact, this Court

---

7. Although "(t)he Constitution does not require either a trial judge or a litigant to give special notice to nonparties," Lehr v. Robertson, 463 U.S. 248, 265 (1983) (emphasis supplied), due process of law requires actual notice to petitioners in a case such as this.

has made clear that "a waiver of a federally guaranteed constitutional right is . . . a federal question controlled by federal law." Brookhart v. Janis, 384 U.S. 1, 4 (1966). Vigilant protection of federal rights requires that this Court make "the application of constitutional principles to the facts as found." Brown v. Allen, 344 U.S. 443, 507 (1953) (Opinion of Frankfurter, J.). This Court has only recently reiterated the principle that waivers of constitutional rights involve mixed questions of law and fact. See Miller v. Fenton, 106 S.Ct. 445 (1985). This holds true on direct review as well as on collateral review. See Blackburn v. Alabama, 361 U.S 199, 205-210 (1960).

There is no need for lengthy citation to demonstrate that the waiver

involved in this case, the waiver of rights which have been deemed "essential, . . . far more precious . . . than property rights," Stanley v. Illinois, 405 U.S. 645, 651 (1972), implicates not merely federally guaranteed constitutional rights, but the most fundamental of rights. See Santosky v. Kramer, 455 U.S. 745, 753 (1982).

A waiver of fundamental constitutional rights may not be found without evidence of "an intentional relinquishment or abandonment of a known right or privilege". Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Moreover, "in the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'" Fuentes v. Shevin, 407 U.S. 67, 95 n.31 (1972)(citation omitted).

Even under the relatively restrictive "cause and prejudice" standard for excusing a failure to comply with a state court procedural rule, utilized by this Court in collateral attacks on state court judgments in habeas corpus proceedings, the judgment below must be reserved. See Wainwright v. Sykes, 433 U.S. 72 (1977). Petitioners plainly have demonstrated "cause" for their failure to notify the court by February 23. Moreover, the "prejudice" to petitioners is self-evident: but for the Court of Appeals' finding of waiver, petitioners would have had their parental rights restored.

Every judge in the New York courts who heard this case agreed that the consent form signed by petitioners failed to provide petitioners with adequate

information about the ramifications of their signatures. Every judge found that the form contained materially misleading information. Thus, there are unanimous findings of fact that petitioners were uninformed at the time they signed the forms of "all other facts essential to a broad understanding of the whole matter." Johnson v. Zerbst, 304 U.S. at 724. Moreover, their ignorance is traceable directly to the New York statute.

Under New York law, signing the extra-judicial consent form "irrevocably waives a fundamental liberty interest in the child." Note, The Constitutional Rights of Natural Parents Under New York's Adoption Statutes, 12 N.Y.U. Rev. L. Soc. Change 617, 655 (1983-84). However, the forms signed by petitioners completely failed to inform them that by

signing the extra-judicial consent form, petitioners were, at that moment, giving up parental rights to their daughter and could regain, at best, the privilege of being heard on equal footing with the pre-adoptive parents in a best interests hearing.

As the plurality opinion in the Appellate Division found, there is nothing in the record to support the conclusion that petitioners "would have signed the extrajudicial consent form [to the adoption] even if they had understood the full consequences of a timely revocation of the consent given on that form." (A-58 - A-59)[8] In addition, the

---

8. By contrast, in a case in which standing was properly found to be lacking, the New York courts concluded that the parent lacked standing to challenge the very same type of defects raised in this case because the record clearly showed that the parent was

concurring opinion in the Appellate Division made a "factual finding that the natural parents never gave their final and unequivocal consent to the adoption of their child Sarah." (A-82)

Because petitioners were not adequately informed of the significance of their signing the extra-judicial consent form, and because that failure is traceable directly to New York Domestic Relations Law §115-b (1)(d), petitioners have been deprived of due process of law and are entitled, as a matter of federal constitutional law, to the return of

---

informed at the time she signed the extra-judicial consent of the consequences of her signing. See Matter of Daniel C., 99 A.D.2d 35, 472 N.Y.S. 2d 572 (2d Dept. 1984); aff'd, 63 N.Y. 2d 927, 483 N.Y.S. 2d 679 (1984). In such a case, it should not matter that the information was not contained in writing in the instrument itself.

their daughter and the reinstatement of the parent-child relationship.

II.
BEFORE PARENTAL RIGHTS MAY BE PERMANENTLY DESTROYED ON THE BASIS OF PARENTAL CONSENT, THERE MUST BE A FACTUAL SHOWING THAT THE PARENTS HAVE WAIVED THEIR RIGHTS.

Not only was there a unanimous agreement below that the notice given to petitioners was inadequate as a matter of law, there were findings of fact, which were undisturbed by the Court of Appeals, that Petitioners "were in fact deceived by the forms used and the procedures followed" (A-77) and that "(t)hey believed that they were able to revoke their consent at any time prior to their appearance before the Court." (A-163 - A-164) The Court of Appeals did not disturb these findings of fact. Instead,

the Court of Appeals simply characterized petitioners' belief as a "mistake" (A-40) and ruled that "mistake is [not] a ground for vitiating consent under Domestic Relations Law §115-b(4)." (Id.)

New York's rule that mistake is an insufficient ground for voiding a consent to adopt deprives petitioners of a fundamental constitutional right without any showing that petitioners would have given up their rights had they understood the legal significance of their conduct. At least in cases such as this, where petitioners' "mistake" was, as the Family Court put it, "well validated" (A-161), due process of law requires that no legal effect be given to the consent form utilized in this case. Doing anything less results in the fiction that, as the concurring opinion in the Appellate

Division said, petitioners "had fully understood the terms of the adoption, fully consented to them and then elected to exercise their 30-day revocation right. . . .[This] subject[s] them to an on-going deprivation of due process of law." (A-79)

CONCLUSION

For the above-stated reasons, this petition for certiorari should be granted.

Respectfully submitted,

Martin Guggenheim
Counsel of Record
New York University
School of Law
715 Broadway
New York, New York 10003
Telephone: (212) 505-7400

Katherine G. Thompson
John E. Halpin
Elizabeth M. Barnett
Sherman, Thompson and Halpin
19 West 44th Street
New York, New York 10036
Telephone: (212) 704-0350

Attorneys for Petitioners

January 1986

STATE OF NEW YORK

COURT OF APPEALS

2 No. 579
In the Matter of Sarah K.
(Anonymous).
Timmy S. (Anonymous) et al.,
Appellants,
Warren K. (Anonymous) et al.,
Respondents,
Robert Abrams, Attorney General,
Intervenor-Appellant.

OPINION

KAYE, J.

This tragic case pits two couples -- each found to be fit as parents -- against each other for custody of Sarah K, now two years old. Sarah, who has Down's Syndrome, was shortly after her birth released for adoption by respondents, her biological parents; her only home has been with appellants, her adoptive parents. When Sarah was 15 weeks old, on the eve of a hearing relating to her adoption, respondents

attempted to revoke the consent they had given three months earlier and regain custody of the child. While respondents challenge the validity of both the statute governing private placement adoptions (Domestic Relations Law § 115-b) and the consent forms they signed, we conclude that in the circumstances presented the defects of which they complain did not harm them, that their "irrevocable consent" must be honored, and that the Appellate Division order returning Sarah to them should therefore be reversed and the petition for adoption granted.

I.

The pertinent facts found by Family Court are as follows. Sarah was born November 6, 1983 to respondents, Warren and Christine K. Shortly after her birth, the obstetrician entered the recovery room and announced his belief

that "the baby is a mongoloid." Respondents decided that they could not keep the child. On November 7, Mr. K told the hospital social worker they had definitely decided to place the child for adoption.[1] She provided him with a list of three agencies as well as the name Janet Marchese, an individual who had previously found adoptive homes for Down's Syndrome children. That same day Mrs. K went home, leaving Sarah behind. Mr. K contacted the agencies as well as Mrs. Marchese. Mr. K assured Mrs. Marchese that respondents only wanted to find a home for Sarah, that he had done his homework, was sure of their decision,

---

1. As noted in the partial dissent at the Appellate Division, the hospital social worker suggested that respondents speak with someone from the Down's Syndrome School in Bellmore, or a family with a Down's Syndrome infant, but they were very determined to proceed with the adoption.

that neither he nor his wife wanted to meet with prospective adoptive parents, and that this was to be accomplished immediately.

Mrs. Marchese on November 8 advised Mr. K that she had found adoptive parents and asked that respondents pay the legal fee for the adoptive parents' counsel, David Verplank, explaining that the adoptive parents would likely incur significant medical expenses. According to Mrs. Marchese, Mr. K -- a lawyer -- said his partner would represent him. According to Mr. K, however, neither he nor his partner (Bruce Regenstreich) had any experience in adoption matters, and his partner participated as a friend. Mr. K testified that he assumed Mr. Verplank represented them, or represented both the natural and adoptive parents in an uncontested proceeding. Family Court

found that Mr. K's only interest was in an expedited adoption, that the technical question of representation was of no particular significance to him at that time, that Mr. Verplank did not believe he represented respondents, and that respondents did not rely on him for advice or consider him their attorney.

On November 8 Mr. Regenstreich called Mr. Verplank, who drafted the adoption consent forms. On November 11, when the baby left the hospital, she was immediately handed over by Mr. K to a nurse accompanying Mr. Verplank, and since that day she has lived with appellants. At the hospital also, Mr. Verplank delivered to Mr. Regenstreich an envelope of documents, including two consent forms, a bill, an attorney's affidavit and a natural parents'. affidavit, and Mr. Regenstreich in turn gave the envelope to Mr. K.

For more than two weeks the documents remained in Mr. K's desk drawer at home, during which time respondents took a brief trip with their son. Then, during the weekend after Thanksgiving (November 26 or 27), Mr. K looked at the documents for -- in his own words -- "no more than two minutes the whole packet," and he signed both consent forms. The first, captioned "Irrevocable Consent," reads

DRL 115 b - 1a
State of New York Family Court
County of Suffolk
Address: Veterans Memorial Highway
Hauppauge, N. Y. 11787

In the Matter of the Adoption
of _____
Adoptive Child

Irrevocable Consent

I, [Respondents' Names], residing at [Respondents' Address], natural (Mother) (Father) of _____, do hereby irrevocably Consent to the Private Placement Adoption of my (daughter) (xxx) _____, born Nov. 6, 1983. I understand that in the event that Consent

is not executed before a Judge of the Family Court, the County of Suffolk then an in that event this Consent shall become irrevocable thirty days after the commencement of the adoption proceeding unless written notice of revocation thereof shall be received by this Court within said thirty days. **

The name and address of the Court in which the adoption proceeding is to be commenced is:

Family Court
County of Suffolk
Address: Veterans Memorial Highway
City: Hauppauge, New York 11787

[Signed]
Natural Mother

[Signed]
Natural Father

** We came to our decision to place our baby for adoption because of her Down's Syndrome condition and our belief that the petitioners are far more capable of dealing with this condition and raising the child than we are.

The second document, also captioned "Irrevocable Consent," reads:

DRL 115 b - 1a

State of New York
Family Court
County of Suffolk
Address: Veterans Memorial Highway
Hauppauge, N. Y. 11787

In the Matter of the Adoption
of _____
Adoptive Child

Docket No.
Irrevocable Consent

I, [Respondents' Names], residing at [Respondents' Address], natural (Mother) (Father) of _____ do hereby irrevocable [sic] Consent to the Private Placement Adoption of our (daughter) (xxx) _____, BORN November 6, 1983. I understand that the Consent I am now giving to said adoption is final and irrevocable and that thereafter I will not be able to regain custody of my (daughter) (xxx) _____ from (her) (xxx) adoptive parents and that I will not be able to maintain an action or proceeding for the return of custody of said child to me.
We came to our decision to place our baby for adoption because of her Down's Syndrome condition and our belief that the petitioners are far more capable of dealing with this condition and raising the child than we are.

[Signed]
Natural Mother

[Signed]
Natural Father

State of New York)
) ss.:
County of Suffolk)

On this _____ day of _____, 19 ___, before me personally came [Respondents' Names], proven to me by the oath of David H. Verplank an attorney admitted to practice in the State of New York to be the person(s) described in and who executed the foregoing instrument, and they acknowledge that they executed the same.

_____
Judge, Family Court

At Mr. K's request, Mr. Verplank had added the following sentence, which was part of both consent forms when respondents signed them: "We came to our decision to place our baby for adoption because of her Down's Syndrome condition and our belief that the petitioners are far more capable of dealing with this condition and raising the child than we are."

Family Court found that Mr. K had concluded, from looking at both consent forms together that nothing would be final until he and his wife appeared in

court. Mr. K so advised his wife, who then signed the documents without even reading them. On November 28, when he returned to work, Mr. K delivered the signed documents to his partner for transmittal to Mr. Verplank.

Appellants commenced the adoption proceeding in Family Court, Suffolk County on December 19, 1983, but it was not until January 23, 1984 that Mr. Regenstreich received notice from the court that a petition for adoption had been filed and a hearing would be held March 1. Mrs. K said that in February she "began to face the reality of the whole situation that [she] had a daughter with Down's Syndrome," and toward the end of the month visited a school for Down's Syndrome children. On February 28, Mr. K told Mr. Regenstreich that they did not want to go forward with the adoption.

The next day, after checking the statute and contacting the Family Court clerk's office, Mr. Regenstreich advised Mr. K that a revocation of consent form had to be executed, and that the March 1 court date had been cancelled. On February 29, 1984, respondents executed and mailed a revocation of consent, which Messrs. K and Regenstreich had prepared. The form was received by the court March 2.

A bifurcated trial was scheduled by Family Court, consisting of a revocation hearing to consider the validity of the consents executed by respondents and the effect of their attempted revocation and, depending on the result, a best interests hearing to consider what placement would best serve the child's interests (Domestic Relations Law § 115-b[1][d][ii]).

After a lengthy trial, by decision dated September 24, 1984, Family Court determined that the extrajudicial consent procedures as applied had deprived respondents of their right of revocation. In reach this conclusion, the court rejected respondents' contention that their consents were vitiated by a state of despair and confusion following the birth, constituting "fraud, duress or coercion in the execution of an adoption consent" (Domestic Relations Law § 115-b[4]). The court found that while respondents were unquestionably in acute emotional turmoil, the evidence did not support a conclusion that grief rendered them incapable of "a rational, although difficult, decision towards the end of November to place Sarah," and further that the "decision to place Sarah for adoption was essentially a calculated and

firm one; the parents did not suffer from indecision or ambivalence.... Their initial decision to place Sarah was ratified by implication on each day that passed after the consent was executed, without objection until months after the fact." Similarly, the court concluded that any violation of the Social Services Law regarding placement of children for adoption -- although it found no violation here -- would be redressed by sanctions against the violators, and would not entitle respondents to dismissal of the adoption petition. But the court agreed with respondents' constitutional challenge, based on a confusion engendered by the two forms and respondents' reasonable belief that they could revoke their consent until it was given before a judge. The court concluded that the remedy was to afford

respondents a best interests hearing, which would place them in the position they would have been in had they received proper notice of their revocation rights under the statute and revoked their consent accordingly.

To resolve the issue of which placement would serve the best interests of the child, Family Court considered the testimony of 28 witnesses. On the basis of financial status, character, mental and physical health, ability to provide for the child's needs, available support from extended family members, continuity and stability, and capacity to accept the child, the court determined by decision dated November 7, 1984, that Sarah's best interests would be served by adoption by appellants.

The Appellate Division, in three opinions, reversed, two justices finding

the statute unconstitional on its face for failing to require that the extrajudicial consent form advise the biological parents that even timely revocation will at best result in a judicial determination of custody based on a "best interests" test, two justices concluding that the particular consent forms misled respondents, and one justice concurring in part, dissenting in part, on the ground that the appropriate remedy for any confusion here was the hearing to determine the child's best interests.[2]

---

2. The Appellate Division, in its plurality opinion, found the remaining points raised by respondents as grounds for invalidating their consents -- (1) duress, (2) lack of counsel and (3) alleged violations of Social Services Law §§ 371 and 374 -- to be without merit, as Family Court had found. We conclude that these findings are fully supported by the record.

II

A parent's consent to the release of a child for adoption has consequence in the law, and cannot invariably be undone at will. The law recognizes that consent implicates not only the very fundamental interests of birth parents, whose decision initiates the process, but also the child's substantial interests in a stable, continuous home environment, and those of third parties, the adoptive parents, who but for the consent would not have become involved.

Domestic Relations Law section 115-b governs extrajudicial consent to private placement adoptions, which is the subject of this appeal. Placed in its historical setting, section 115-b was enacted in 1972 to reform statutory and decisional law, perceived as unfair to adoptive parents and unsettling to adoptions

generally, which permitted biological parents to revoke consent any time before the final order of adoption and recognized their primacy of status (L 1972, ch 639; L 1973, ch. 1035). (See, e.g., People ex rel. Scarpetta v Spence-Chapin Adoption Serv., 28 NY2d 185, 192, app dsmd sub nom DeMartino v Scarpetta, 404 US 805; People ex rel. Kropp v Shepsky, 305 NY 465.) An effort was made by this reform to introduce certainty and finality by limiting a parent's right to revoke consent, with the stated intention of balancing the rights of surrendering parents, adoptive parents and children. "This legislation is intended to provide a legal framework within which future adoptions can be undertaken with reasonable guarantees of permanence and with humane regard for the rights of the child, the natural mother and the

adoptive parents...." The statute provided "stronger guarantees of the permanence of child adoption arrangements involving authorized social agencies and private placement adoptions. The uncertainty under which the adoptive parents are now required to live cannot but adversely affect the relationship between them and the child during the period prior to the actual adoption.... The broad damage that was done by the recent cases was to strike terror in the hearts of prospective adoptive parents and actually discourage other parents from entertaining adoption." (NY Legis Ann, 1972, p 203.)[3] "[T]his desire for

---

3. In 1971 the Governor disapproved a similar bill which would have granted to consenting parents an absolute right to bar an adoption during the 30-day revocation period. "This objectionable provision has been eliminated, thereby affording our courts adequate discretion to protect children from traumatic disruption of long-standing placements." (Governor's Memorandum, NY Legis Ann,

certainty is desperately needed by adoptive parents a well, who at present are living under the shadow of fear by recent court decisions. The bond, the love, the intense emotion between adoptive parents and the child placed in their home, is created the very moment their dream is fulfilled and a child comes through the door of their home. The unconscionable uncertainty and gap in our laws on this subject at present will be remedied by this bill." (Memorandum from Office of Senate Temporary President, Bill Jacket, L 1972, ch. 639.)

The objective of adding certainty and finality was achieved by the following statutory scheme. Consents executed or acknowledged before a judge or surrogate in which the adoption proceeding was to be commenced ("judicial

---

1972, pp 360-361.)

consents"), if they so stated, became immediately irrevocable (Domestic Relations Law § 115-b[1][c]). Consents not so executed or acknowledged ("extrajudicial consents"), if they so stated, became irrevocable 30 days after commencement of the adoption proceeding unless written notice of revocation was received by the court within that thirty-day period (Domestic Relations Law § 115-b[1][d][i]). Even if such consent were timely revoked, however, the child would not be returned to the biological parents where the adoptive parents opposed revocation, but the revocation would be given effect only where the court "shall have determined that the best interests of the child will be promoted by giving force to such revocation" (Domestic Relations Law § 115-b[1][d][ii]). In a best interests proceeding, biological

parents had no right to custody superior to that of adopting parents, notwithstanding that they are fit, competent and able to maintain, support and educate the child. Custody was to be awarded solely on the basis of the child's best interests, without any presumption that such interests will be promoted by any particular custodial disposition (Domestic Relations Law § 115-b[1][d][ii],[3]).

Respondents' quarrel is not with the underlying substance of the statute. Indeed, a position that biological parents can revoke consent at any time until the adoption becomes final, or that they are entitled to a primacy of status over the adoptive parents in any dispositional hearing, would be a return to the law prior to the legislative reform and precisely contrary to the very

purposes for which the statute was enacted. Nor do respondents claim that extrajudicial consents to private placement adoptions are per se invalid, or that the legislature is without power to make such consents irrevocable after a fixed period, or that a 30-day period is unreasonable.

Rather, respondents claim that they were not afforded proper notice of the operation and effect of the statute, in three respects.[4] First, respondents urge

---

4. The consent forms essentially followed the statute, so that respondents' arguments may be considered as addressing the statute, or the forms, or both. In three respects respondents' consents differ from those presented by prior case law (see, e.g., Matter of Daniel C., 63 NY2d 927). First, while the statute provides for judicial and extrajudicial consents, in the disjunctive, respondents signed both. Second, a sentence was added to both consents at respondents' request stating the reason for the release (see, p 5 supra). Third, a modifier such as "this" or "such" does not appear before the word "Consent" in the second sentence of the extrajudicial consent they signed.

that the statute is defective because it does not require notice to the biological parents of the commencement of an adoption proceeding, so they can know when their 30-day revocation period begins. Second, they contend that the statute does not, but should, require that biological parents be informed that, upon revocation, they do not necessarily secure the return of their child, but may face a best interests hearing in which they stand on equal footing with the adoptive parents. Third, apart from the particular statute or language of either document, respondents contend that their consent must be invalidated because, when the two forms were read together, they fostered a misleading belief that consent

---

While the consents in issue were prepared by Mr. Verplank, they follow forms that have been in regular use. See, McKinney's Forms, Matrimonial and Family Law, §§ 14:86D and 14:86E.

was only tentative until respondents appeared in court.

The purported failure of the statute or extrajudicial consent forms to provide for notice of either the commencement of the adoption proceeding or the limited right of revocation -- respondents' first two contentions -- has several times elicited judicial criticism.

In Matter of Anonymous (55 AD2d 383), the biological parents sought to revoke their extrajudicial consent to adoption on the ground that the statute failed to provide for notice to them of the commencement of the adoption petition. While the majority concluded that in the circumstances it was not necessary to reach the issue of constitutionality of the statute, the dissenting justice would have declared the statute unconstitional for failing to

require in the extrajudicial consent any provision for adequate notice to biological parents as to when the adoption proceeding is commenced. He concluded that "insofar as the statute hereinclearly affects the right of natural parents to the care and custody of their child, a right deemed 'essential,' 'basic' and 'precious' [citations omitted] it is incumbent upon the State to provide adequate notice to the natural parents before a child is irrevocably taken away from them." (Id. at 387.)

In Matter of Daniel C. (115 Misc 2d 130, affd 99 AD2d 35, affd 63 NY2d 927), while the courts concluded that the mother lacked standing to challenge the statute because in the particular circumstances she had not been misled, concern was voiced at every level about

the extrajudicial consent form. The acting Surrogate recognized that a lay person "could easily infer from the language of the form that ... the consent ... could be revoked and upon revocation the parties would be restored to a status quo position," and urged that "the official form should be revised so as to eliminate any possibility of a natural parent being deceived on the one hand, or on the other hand being in a position to claim that he was deceived." (115 Misc 2d at 133-134.) The Appellate Division majority noted that the case should not "become a springboard for returning the State to the deplorable situation that prevailed before the enactment of section 115-b," and concluded that "if the statute has defects, the cure is with the Legislature." The dissenting justice, however, would have dismissed the

adoption petition because the consent did not advise a signatory that timely revocation would not result in return of the child (99 AD2d 47, 70). We agreed with the Appellate Division majority that, by reason of the biological mother's lack of standing, it was not necessary to reach any constitutional issue, but the dissenting judge in this Court concluded that the consent form complied with neither statutory not due process requirements (63 NY2d at 929 [Jasen, J., dissenting]).

In the present case, Family Court, addressing section 115-b, described the proceeding as presenting "a tragic scenario of misguided practices which should rightfully sound the alarm for reform of adoption procedures in this state." Two Appellate Division justices, in reversing, found the statute

unconstituional on its face in failing to require that the consent form advise the natural parents of all the consequences of a timely revocation of consent, noting that the attack on the statute's failure to provide they be given notice of when the 30-day revocation period commences "also has merit." The other two justices of the majority concluded that, on the facts, respondents did not give final and unequivocal consent to the adoption, but agreed that the statute was "badly flawed" in failing to provide for notice as to commencement of the adoption proceeding, and "troubling" in its failure to require notice that timely revocation at most results in a best interests hearing, not return of the child.[5]

---

5. In addition, extrajudicial consents have several times been found invalid (see, e.g., Matter of Unnamed Baby Boy, 110 AD2d 1019; Matter of Male

In each year of the past three years, there have been more than 7,000 adoptions (Source of Statistics: Office of Court Administration). In the extraordinary circumstances presented, where the statute is necessarily in wide use, where any defect may have profound impact on the lives of children and families, and where deeply troubling constitutional issues have several times been identified but have typically evaded review, we will first consider whether there is any infirmity in the statute or the consent forms, as alleged, before reaching the question of the parties' particular circumstances (see, People v Liberta, 64 NY2d 152; People v Parker, 41 NY2d 21, 25).

Infant M., 76 AD2d 389, lv denied 50 NY2d 1056; Anonymous v Anonymous, 108 Misc 2d 1098, affd sub sub nom Dennis T. v Joseph C., 82 AD2d 125, lv denied 55 NY2d 792; Matter of Janet G., 94 Misc 2d 133; Matter of James M. G., 86 Misc 2d 960).

We approach this inquiry bearing in mind that a statute will be interpreted, if possible, so as to uphold its constitutionality (see, Loretto v Teleprompter CATV Corp., 58 NY2d 143, 149), and in accordance with its manifest intent and purpose (see, Matter of Sabot v Lavine, 42 NY2d 1068, 1069). We read Domestic Relations Law § 115-b to require that extrajudicial consent forms advise biological parents of the effect of their act, so that they are fully informed of their limited rights in the event they choose to make timely revocation, and we further conclude that the right to revoke consent runs from the date the biological parents are notified of the commencement of an adoption proceeding.

Section 115-b(1) begins: "If a duly executed and acknowledged consent to a private-placement adoption shall so

recite, no action or proceeding may be maintained by the consenting parent for the custody of the child to be adopted, and no such consent shall be revoked by such parent if...." Among the subparagraphs of the section is (d)(ii), providing:

> "Notwithstanding that such written notice shall have been received within said thirty days, the notice of revocation shall be given effect only if the adoptive parents fail to oppose such revocation, as provided in subdivision three of this section, or, if they oppose such revocation and the court as provided in subdivision three of this section shall have determined that the best interests of the child will be promoted by giving full force and effect to such revocation."

We read paragraph 1 to mean that, in order to fulfill the requirements of the statute, a consent must set forth the substance of what is provided in the entire paragraph, as appropriate, including the provisions of subparagraph

(d) (see, Dennis T. v Joseph C., 82 AD2d 125, supra). This is in keeping with the expressed fundamental premise and objective in enacting section 115-b that a parent's consent should be knowledgeable (see, Memorandum in Support, Chief Sponsor, Bill Jacket, L 1972, ch. 639). Just as Domestic Relations Law § 115-b(2), involving judicial consents, requires the court to inform a parent of the consequences of consent, so in the case of extrajudicial consents, where there is no judge or surrogate to discharge this function, the mandates of section 115-b(1) serve to notify parents of the consequences of their consent.[6]

---

6. See, Frieden, The Constitutional Rights of Natural Parents Under New York's Adoption Statutes, 12 NYU Rev Law & Soc Change 617, concluding that to meet constitutional requirements, all consents should be executed before a court; and Note, Natural vs Adoptive Parents: Divided Children and the Wisdom of

Similarly, Section 115-b(1), in fixing a reasonable time limitation on the right to revoke consent, presumes that the biological parent will receive notification of the adoption proceeding. Domestic Relations Law § 111(3) provides that "Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders." Since the legislature provided for a 30-day revocation period as of right, triggered by the adoption proceedings, it may fairly be implied that notice to the

---

Solomon, 57 Ia L Rev 171, to the same effect. See also, Matter of Anonymous (G.) (89 Misc 2d 514, 416), regarding salutary procedures to assure that judicial consents are fully informed.

biological parents of the proceedings is required. Where they are not notified at the commencement of the adoption proceedings, then their 30-day period to evoke consent must begin to run when they are furnished notice.

Thus, we conclude both that Domestic Relations Law § 115-b requires that extrajudicial adoption consents notify the biological parents of the limited nature of their right of revocation, and that their 30-day revocation period runs from notice to them of the commencement of an adoption proceeding.

III

We next turn to the application of these principles to respondents' contentions that their consents should be vitiated because they were improperly denied notice of the commencement of the adoption proceeding or the effects of

timely revocation, and because they were misled by both forms and mistakenly believed their consent was tentative until they appeared in court.

Although respondents did not receive notice of the adoption proceeding until a month after it had commenced, and although the extrajudicial consent respondents signed failed to advise them of the consequences of a timely revocation, respondents suffered no injury as a result of either omission. It is axiomatic that there is no standing to complain where an alleged defect in or violation of a statute does not injure the party seeking redress (cf., County Court of Ulster County v Allen, 442 US 140, 154-155). Birth parents obviously would have no standing to complain that the consequences of timely revocation were omitted from consent forms if they

were otherwise fully informed of those consequences (see, Matter of Daniel C, supra), or if they made no effort to revoke consent within 30 days of notification of the adoption proceeding. In either case absence of information from the form would not have affected them.

Respondents were entitled to receive notice of the commencement of the adoption proceeding, and the 30-day period for revocation of their consent could not begin to run against them until they were furnished such notice. Here, respondents were not advised when the adoption proceeding was commenced on December 19, 1983, but they were notified by Family Court on January 23 that there would be a preliminary hearing in connection with the adoption, including the case caption number, and surely knew

then that an adoption proceeding had been commenced. Their right to revoke therefore must be measured from that date, and it ended 30 days later, on February 23. Respondents' revocation on February 29, received by Family Court March 2, 1984, was plainly untimely. Having failed to revoke their consent within the 30-day statutory period, respondents cannot complain of a failure to advise them of what the consequences of a timely revocation would have been.

Respondents urge, however, that their tardiness should be excused, and the revocation should be treated as timely, because they believed that they could revoke their consent until they appeared in court in connection with the adoption. Although respondents may indeed have believed that their revocation was timely until a court

appearance, their confusion was not caused by either consent form. Each form was captioned "Irrevocable Consent." The judicial consent form they signed stated "the Consent I am now giving to said adoption is final and irrevocable." The extrajudicial consent form they signed stated that "in the event that Consent is not executed before a Judge of the Family Court, the County of Suffolk then in that event this Consent shall become irrevocable thirty days after the commencement of the adoption proceeding unless written notice of revocation thereof shall be received by this Court within said thirty days." This language in and of itself was not misleading, complied with the statute, and accurately conveyed the time limitation placed on revocation by Domestic Relations Law § 115-b(1)(d)(i).

Respondents' subjective confusion, they say, arose not from any particular defect in either form or any representation by any third person, but as a result of their having received, glanced at and signed both forms together. Under such circumstances, the language of the form, not any mistaken impression gained by one party regarding the legal consequences of that language, must control (see, Goodison v Goodison, 66 AD2d 923, 924, affd 48 NY2d 786). Similarly, Mrs. K's failure to read the forms before she signed them can be no excuse. She is presumed to have understood the contents of the documents she signed and agreed to them (see, Metzger v Aetna Ins. Co., 227 NY 411, 416).

Moreover, neither emotional distress nor mistake is a ground for vitiating

consent under Domestic Relations Law § 115-b(4). Release or surrender of a child for adoption is a traumatic event, heightened here by Sarah's condition. But no consent, and surely no consent to the adoption of a handicapped child, could ever be relied on if it were revocable on such a basis. Respondents were single-minded in their resolve that Sarah be adopted immediately, and they sought out -- and found -- the quickest way to accomplish their objective, for the perceived good of the child as well as their family. Respondents held the consent forms for two weeks before signing them, then remained steadfast in their decision for three months thereafter, knowing the child was meanwhile making a life with appellants, as her prospective adoptive parents. Their consents included a statement of

belief that appellants "are far more capable of dealing with this condition and raising this child than we are." Even when they learned of the adoption proceeding in January, for more than a month they took no action, until Mr. K and his law partner called the court and for the first time consulted the statute, and then drew up a revocation. The consequence of a mistaken impression gained from Mr. K's "two-minute" review of the critical documents cannot be visited on others.

Respondents were thus obligated to submit any revocation within 30 days after they received notice of the adoption proceeding, unless they could establish "fraud, duress or coercion in the execution" of the consent (Domestic Relations Law § 115-b[4]). In evaluating respondents' claim in this regard, it is

crucial to recognized that under the statute, it would be insufficient to show that one was simply mistaken as to the meaning of a form. Rather, the claim must be that the consent was signed under compulsion or threat, or against one's free will, or based upon fraudulent statements (see, e.g., Matter of Unnamed Baby Boy, 110 AD2d 1019, supra; Gerstein v 532 Broad Hollow Road Co., 75 AD2d 292, 297; Matter of E.W.C., 89 Misc 2d 64, 71-73). Such evidence or finding is absent here.

Having failed to make any effort to revoke within 30 days of notification of the adoption proceeding, respondents are bound by their consent, and appellants' petition for adoption should have been granted. We therefore do not reach the infirmities alleged by respondents in the best interests proceedings held before

Family Court, which determined on the basis of several grounds including health, character, and ability to accept and provide for the child that Sarah's best interests were served by her adoption by appellants.

IV

While the issues before us are resolved without reach the constitutionality of the statute, we note that the reforms of 1972 were motivated by the legislature's concern that controversy and uncertainty overhung adoptions. Because certain dissatisfactions with the statute in its actual application have now several times been identified in the case law and literature, we believe it would be highly desirable for the legislature to examine Domestic Relations Law § 115-b in the light of thirteen years' experience, for

it appears that the well-founded concerns that engendered the law are not yet dispelled.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the petition for adoption granted.

* * * * * * * * * * *

Order reversed, with costs, and petition for adoption granted. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Alexander and Titone concur.

Decided November 14, 1985

SUPREME COURT : APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

MANGANO, JP.P, BROWN, O'CONNOR, WEINSTEIN and LAWRENCE, JJ.

IN THE MATTER OF SARAH K. (ANONYMOUS).

TIMMY S. (ANONYMOUS), ET AL.,

Appellants-Respondents;

WARREN K. (ANONYMOUS), ET AL.,

Respondents-Appellants;

ROBERT ABRAMS, Attorney-General,

Intervenor-Respondent.

CROSS APPEALS from a nondispositional order of the Family Court, Suffolk County (DENNIS R. HURLEY, J.), dated September 24, 1984, which deemed a notice of revocation of an extrajudicial consent to an adoption, signed by the natural parents of the infant in question, to have been timely given, and directed that

a hearing be held to determine whether the best interest of the child required that the notice be given effect and thereupon the infant be returned to her natural parents or that a petition for her adoption be granted, and APPEAL from a nondispositional order of the same court, dated November 7, 1984 and made after said best interests hearing, which refused to give effect to the notice of revocation of consent filed by the natural parents and, in effect, granted the adoption petition

M A N G A N O, J. P. The primary question to be resolved on the instant appeals is whether the extrajudicial consent to an adoption, made by the natural parents of the child, was a valid and effective one. The question must be answered in the negative. In my view, Domestic Relations Law § 115-b, pursuant

to which the form upon which the natural parents gave their extrajudicial consent was promulgated, is unconstitutional on its face, insofar as it fails to require that such an extrajudicial consent form to an adoption advise the natural parents that even if they timely revoke their extrajudicial consent to the adoption, as allowed by statute, the child will not necessarily be returned to them, but may be subject under certain circumstances, to a judicial determination of custody based on a "best interests" test. Since the extrajudicial consent form executed by the natural parents in the case at bar did not so advise them, their consent given on that form cannot stand and must be declared null and void. Accordingly, the infant must be returned to her natural parents.

I

At the outset we must dispose of a procedural problem. The adoptive parents have appealed, as limited by their brief, from so much of an order of the Family Court, Suffolk County, dated September 24, 1984, as deemed a notice of revocation of an extrajudicial consent to an adoption, signed by the natural parents of the infant in question, to have been timely given. The natural parents have cross-appealed, as limited by their brief, from so much of the same order as, upon considering their notice of revocation of their consent to the adoption to have been timely given, failed to direct that the child be returned to them forthwith and instead directed that a hearing be held to determine whether her best interests required that she be returned to her

natural parents or that the adoption petition be approved.

The appeal and cross appeal from the order dated September 24, 1984, must be dismissed because no appeal lies as of right from a nondispositional order of the Family Court (Family Ct Act § 1112[a]). The issues raised on that appeal and cross appeal are brought up for review and have been considered on the appeal by the natural parents from the dispositional order of the Family Court, dated November 7, 1984, which refused to give effect to the notice of revocation of consent filed by the natural parents and, in effect, granted the adoption petition (see, Family Ct Act § 1112 CPLR 5501 [a][1]).

II

Warren and Christine K. are the natural parents of a girl, Sarah, who was born on November 6, 1983, with the

condition known as Down's Syndrome. They decided to give the child up for adoption and her physical transfer was made on November 11, 1983. Toward the end of November 1983, the natural parents executed two separate consent forms to the adoption. The first was a judicial consent form, which pursuant to statute (Domestic Relations Law § 115-b [1][c]), and its terms, becomes operative and "irrevocable" only when "executed or acknowledged before a judge or surrogate of the court in which the adoption proceeding is to be commenced" (emphasis supplied). The second was an extrajudicial consent form which pursuant to statute (Domestic Relations Law § 115-b [1][d][i]), and its terms, is operative immediately and becomes irrevocable "thirty days after the commencement of the adoption proceeding unless written

notice of revocation thereof shall have been received * * * within said thirty days" (emphasis supplied).

Both consent forms contained the following language which was added at the request of the natural father who is an attorney:

> "We came to our decision to place our baby for adoption because of her Down's Syndrome condition and our belief that the petitioners are far more capable of dealing with this condition and raising the child than we are."

On December 19, 1983, an adoption proceeding was commenced on behalf of the adoptive parents in the Family Court, Suffolk County. However, the natural parents first received notice of the adoption proceeding between January 23 and January 25, 1984, more than 30 days after its commencement, when their attorney received notice from the Suffolk County Family Court that the petition for

adoption had been filed and that a hearing on the petition for adoption would be held on March 1, 1984.

Toward the end of February 1984, the natural mother made certain inquiries and did research into the subject of Down's Syndrome. Both she and her husband decided to revoke their consents to the adoption. On February 29, 1984, they forwarded a revocation of consent form which was received by the court on March 2, 1984. The court hearing, scheduled for March 1, 1984, was cancelled.

III

The natural parents argued in Family Court that Domestic Relations Law § 115-b is unconstitutional on its face in that it (1) fails to require that they be given notice as to when the 30-day revocation period begans and (2) fails to require that they be informed of all the

consequences of timely revocation of an extrajudicial consent to an adoption, to wit, that if the adoptive parents oppose the timely revocation of an extrajudicial consent, the child is not immediately returned to the natural parents but rather a "best interests" hearing is held at which the natural parents do not have any superior right to the custody of the child (Domestic Relations Law § 115-b [3][d][i],[ii],[v]).

In addition, the natural parents argued before the Family Court that by virtue of their simultaneous execution of both an extrajudicial and judicial consent form to the adoption they became confused and assumed that (1) the judicial consent form was the controlling form and (2) their consent to the adoption was therefore "tentative" or inoperative, until they appeared at a

hearing before the appropriate Surrogate or Family Court Judge.

The Family Court rejected the natural parents' constitutional attacks on the statute on the ground that they were not aggrieved by either of the two alleged defects in that the natural parents had failed to comply with the 30-day provision of the statute even after they actually received notice of the adoption hearing (relying upon, Matter of Anonymous, 55 AD2d 383) and (2) the record indicated that the natural parents would have executed the extrajudicial consent form even if they had been advised of all the consequences of a timely revocation of their consent given on that form.

With respect to the natural parents' argument that they were confused by the simultaneous execution of both an

extrajudicial and a judicial consent form to the adoption, the Family Court did not accept this argument in toto. However, it did hold that the simultaneous execution of both consent forms had the effect of confusing them with respect to the time period within which their extrajudicial consent to the adoption could be revoked. Specifically, the Family Court was of the view that the natural parents could reasonably have believed that they had until March 1, 1984, the day of the hearing on the adoption, to revoke their extrajudicial consent. Accordingly, to remedy what it perceived as a denial of due process to the natural parents, the Family Court treated their revocation of their extrajudicial consent as timely and afforded the natural parents a "best interests" hearing as mandated by the

statute (Domestic Relations Law § 115-b [3][d][ii]).

At the conclusion of the hearing, the Family Court held that the "best interests" of the child would be served if she were adopted by the proposed adoptive parents.

IV

In reaching its conclusion, the Family Court implicitly recognized the distinction between an extrajudicial and a judicial consent to an adoption when it held that the confusion of the natural parents was limited solely to the question of the time that they had to revoke the extrajudicial consent form. Indeed, I have no quarrel with the holding of the Family Court on this particular aspect of the case.

Nevertheless, I am of the view that the Family Court erred in rejecting, on

the basis of standing, the natural parents' constitutional attack on the statute's failure to require that the extrajudicial consent form advise them of all the consequences of a timely revocation of their consent given on that form. In rejecting this attack on the statute, the Family Court relied on the decision of this court in Matter of Daniel C. (99 AD2d 35, affd 63 NY2d 927). In Matter of Daniel C. the natural mother argued that (1) "as a matter of judicial construction section 115-b must be found to require the consent form to inform the signer concerning the actual legal consequences of a notice of revocation" and (2) if the statute was not so construed, it was unconstitutional and deprived the natural parents of due process by sanctioning the use of the "deceptive form" (Matter of Daniel C., 99 AD2d 35, 39, supra).

The majority of this court in Matter of Daniel C. (supra), held that the statute was clear in its intent that the consequences of a timely revocation of an extrajudicial consent form to an adoption, need not be included in that form. With respect to the constitutional argument raised by the natural mother, the majority of this court and the Court of Appeals held that the natural mother was not aggrieved by this alleged defect in Domestic Relations Law § 115-b, in view of her lawyers' explicit concession, on the record, that she had not been misled by the consent form. No such concession exists on this record, and it is unclear, from the decision of the Family Court, what other facts led it to the conclusion that the natural parents would have signed the extrajudicial consent form, even if they had understood

the full consequences of a timely revocation of the consent given on that form. Presumably, it was the language inserted by the natural parents in the consent form that influenced the Family Court to hold as it did on the issue of standing.

In my view, the inserted language simply indicates that the natural parents initially had no doubts about their decision to place their child up for adoption. However, the inserted language does not in any way constitute a concession by the parents that they would have signed the extrajudicial consent form to the adoption even if they had known of all the consequences that would occur if they decided to timely revoke their consent, which they had a right to do pursuant to the statute. Without a concession similar to the one in Matter

of Daniel C. (supra), the attack of the natural parents on the statute must be considered on the merits, and on the merits, the statute does not pass constitutional scrutiny. In this regard, the dissent of Justice Gibbons in Matter of Daniel C. (99 AD2d 35, 66-68, 69, supra), is particularly relevant:[1]

> "A due process analysis proceeds through a two-part inquiry: whether there has been a deprivation of a protected liberty or property interest, and if so, what process is due (see Logan v. Zimmerman Brush

---

1. In Matter of Daniel C.(99 AD2d 35, affd 63 NY2d 927), Justic Gibbons was of the view that in order to withstand a constitutional attack, Domestic Relations Law § 115-b had to be construed to read that the natural parents be informed, in the body of an extrajudicial consent form, that a timely revocation thereof would not necessarily result in the immediate return of the child to them. Accordingly, his dissent was addressed to the failure of the extrajudicial concent form to conform to the statute. However, his language is equally applicable to the statute, which the majority of the court ruled, in Matter of Daniel C., could not be so construed.

Co., 455 US 422, 428). There can be no doubt that parental rights are a constitutionally protected interest since the Supreme Court has consistently recognized that freedom of choice in matters of family life is a fundamental liberty interest (see Santosky v Kramer, 455 US 745, 753, and cases cited therein). Our State courts have also recognized that the interest of the natural parent in remaining the legal parent of his or her child is of constitutional magnitude (see Matter of Leon RR., 48 NY2d 117). Thus, it had been held that 'a court may not terminate all parental rights by offering a child for adoption where there has been no parental consent, abandonment, neglect or proven unfitness, even though some might find adoption to be in the child's best interests (Matter of Corey L. v Martin L., 45 NY2d 383; Matter of Sanjivini K., 47 NY2d 374, 382; see, also, Matter of Ricky Ralph M., 56 NY2d 77). A natural parent's 'desire for and right to "the companionship, care, custody, and management of his or her children"' is an interest far more precious than any property right (Lassiter v Department of Social Servs., 452 US 18, 27, quoting from Stanley v. Illinois, 405 US 645, 651). It follows that when then State establishes a mechanism to terminate familial bonds, it must provide the parents with fundamentally fair procedures (Stantosky v Kramer, 455 US 745, supra).

"Due process requires, at a minimum, 'that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case' (Mullane v Central Hanover Trust Co., 339 US 306, 313). However, the due process rights to notice and a hearing prior to a civil judgment are subject to waiver (Fuentes v Shevin, 407 US 67, 94-95; Overmeyer Co. v. Frick Co., 405 US 174, 185). Where there is a waiver of adjudication, the functional equivalent of notice is the presentation of information to the waiving party (Rubin, Toward a General Theory of Waiver, 28 UCLA L Rev 478, 539; Note, Fairness, Flexibility, and the Waiver of Remedial Rights by Contract, 87 Yale LJ 1057, 1074-1077). In the extrajudicial adoption context, the consent form, which operates as a waiver of parental rights, undertakes the notice function since it is the only statutorily guaranteed source of information for the natural parent. Generally, notice given prior to a hearing must clarify the basis for the government's proposed action in order to give the party a chance to defend himself (see Wolff v McDonnell, 418 US 539; Goldberg v Kelly, 397 US 254). But, in a waiver setting, where there is no opportunity for a hearing or defense on the merits, the purported waiver document must inform the party of the legal consequences of the waiver so that an intelligent decision can

be reached (see Fuentes v Shevin, 407 US 67, 95 supra; Stone v Maher, 527 F Supp 10, 17; County of Ventura v Castro, 93 Cal App 3d 462, cert den 444 US 1098). If a consensual adoption proceeding is to afford a natural sufficient in form to warrant the relinquishment of parental rights (see Matter of Andersen, 99 Idaho 805).

"'A waiver is "the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it"' (Werking v Amity Estates, 2 NY2d 43, 52, quoting from Whitney, Contracts [4th ed], p 273). Where personal liberty is involved, as in the criminal context, it is generally held that a waiver of due process rights must be voluntarily, knowingly, and intelligently made (see, e.g., Brady v United States, 397 US 742, 748; Miranda v Arizona, 384 US 436, 444; see, also, Johnson v Zerbst, 304 US 458, 464). The standard for relinquishment of parental rights, also a fundamental liberty interest, has been held to be governed by the same standard (see Matter of T.W.C., 38 NY2d 128; Matter of Infant S. [Tretin], 48 AD2d 425, 426). Since the consent to adoption constitutes the relinquishment of parental rights, it must be executed with full awareness of the legal consequences (Matter of Andersen, 99 Idaho 805, 815, supra)

> "Given the above circumstances, I conclude that the extrajudicial consent form used in this case is deceptive since it conveys to the lay person the impression that it can be wholly extinguished within 30 days of the initiation of the adoption proceeding and that no untoward consequences will flow from it if revocation is timely. The impression thus conveyed is a strong and unfair inducement to the procurement of consents to the adoption. The form actually undermines the knowing and voluntary nature of the consent (see Matter of Andersen, 99 Idaho 805, supra). Of particular significance is the fact that, as already noted, constitutional principles and our basic societal mores generally allow a natural parent to remain the legal parent even if he/she is not the best parent possible, or even available, and that he or she will continue to fill this role even if it might be said that the child's best interests would otherwise be served (see Matter of Ricky Ralph M., 56 NY2d 77, supra)."

Since Domestic Relations Law § 115-b is unconstitutional on its face in failing to require that an extrajudicial consent form to an adoption advise the natural parents of all the consequences of a timely revocation of their consent

if given on that form, the extrajudicial consent herein, which was executed pursuant to the statute, was invalid, and the infant child must be returned to her natural parents.[2]

VI

Accordingly, the appeal and cross appeal from the nondispositional order dated September 24, 1984, should be

---

2. The natural parents' attack on the statute's failure to provide that they be given notice of when the 30-day revocation period commences, also has merit (see, Matter of Anonymous, 55 AD2d 383, 385, 390 [Suozzi, J., dissenting]). Indeed, the Family Court's rejection of this argument based on the natural parents' failure to revoke their consent within 30 days after receiving notice of the adoption hearing is inconsistent with (1) its specific finding that they were confused as to time period within which they could revoke and (2) its holding that their revocation would be treated as timely. However, a "best interests" hearing is the proper remedy for this particular consitutional defect (see, Matter of Anonymous, supra) and a "best interests" hearing was in fact granted in this case.

dismissed, without costs or disbursements. The dispositional order dated November 7, 1984, should be reversed, without costs or disbursements, the nondispositional order of the same court dated September 24, 1984, should be vacated, the judicial and nonjudicial consents to adoption signed by the natural parents should be declared void ab initio, the petition for adoption should be denied, and the matter should be remitted to the Family Court, Suffolk County, for the transfer of custody of the infant from the adoptive to the natural parents as expeditiously as possible.

LAWRENCE, J. concurs.

O'CONNOR, J. (concurring). The threshhold question here presented -

indeed the overriding issue - is whether the natural parents, if otherwise fit, have either abandoned, surrendered, or forfeited their parental rights.

Part of that inquiry is quickly resolved because, in its discussion of the character and fitness of both the natural and the proposed adoptive parents, nisi prius found:

> "Christine K., Warren K., Lisa S., and Timmy S. are fine people, each possessing the positive character traits that a Court looks for in custody disputes and too often fails to find."

So much for the fitness issue.

But what of the forfeiture or surrender of their parental rights. Did the natural parents knowingly and intelligently surrender those rights?

The proposed adoptive parents maintain that the natural parents, having signed the extrajudicial consent form and having then failed to timely file a

revocation pursuant to Domestic Relations Law § 115-b, may not now revoke their consent and the adoption is in order.

The natural parents reply with multi-faceted constitutional attack on the extrajudicial consent form which they signed in November 1983, the statute upon which that form is based (Domestic Relations Law § 115-b), and the manner in which the form was executed.

In addressing these issues and in the course of an extended hearing, Family Court concluded that:

> "Under the circumstances, and in considering the evidence presented, the Ks'. claim that they thought their consent to be tentative, or preliminary, is entirely plausible. They believed that they were able to revoke their consent at any time prior to their appearance before the Court. That belief was induced by the forms and procedures used by the adoption bureau of the Family Court in Suffolk County plus the other circumstances in the case."

It then concluded:

> "That Mrs. K. fully believed that to be so is evidenced by the fact that she forced herself to visit a school for Down's Syndrome children, and otherwise learn about the disability, immediately prior to the scheduled Court appearance. That visit, and the information obtained are what crystalized the Ks'. decision to revoke their consent. They thought, although their decision was made at the eleventh hour, that it was timely. The application of Section 115-b so as to make their revocation effort untimely deprives the Ks. of due process of law."

As we analyze the circumstances existing at the time the consent forms were signed, let us first find out how this all came about. Where did the forms originate? Who prepared and drafted them. Were the natural parents represented by counsel? Did counsel or anyone explain the full signficance of the forms? Who filed the forms? Who drew the adoption petition? Who filed it? Did anyone notify the natural parents of the date of the filing? Very

interesting questions. Let's look at the answers.

Directly after Sarah's birth, the obstetrician walked into the recovery room and flatly announced to Warren and Christine K., "I have bad news for you, I am almost certain that the baby is a Mongoloid". Devastating news indeed and enough to tumble the Ks. into a state of shock and trauma. They began discussing whether or not they could take care of their unfortunate baby and in this state of mental upheaval, they concluded that they could not. A social worker at the hospital referred them to a woman named Janet Marchese, a person whom the Family Court described as "a full time humanitarian", who had been successfully involved in the placing of some 600 to 700 Down's Syndrome children. Mrs. Marchese recommended David Verplank, a

lawyer with whom she worked, and sugged that Mr. K. pay Verplank's fee because the adoptive parents would, in all probability, incur significant medical bills following the adoption. Mr. K. agreed.

Five days after Sarah's birth, on November 11, 1983, Mr. K. went to the hospital and handed Sarah to a nurse who had accompanied Mr. Verplank for the purpose of the transfer. With Mr. K. at the time was one of his law partners, who was there, not in his capacity as an attorney, but as a close friend. Indeed, the court found that "[n]either Warren K., nor either of his two partners had any experience or prior knowledge concerning adoptions". It is hardly necessary to note that at this point in time, there was complete harmony between the parties and that that condition

continued until the Ks., after deciding that they were making a mistake, attempted to regain custody of Sarah. On November 11, Verplank gave to Mr. K's. law partner an envelope containing papers which he (Verplank) had prepared for Warren and Christine K. to sign. The partner handed the envelope to Mr. K. and when the latter opened it the following weekend, he found the following:

(1) a judicial consent form which becomes irrevocable when "executed or acknowledged before a judge" (Domestic Relations Law § 115-b [1][c]). At the bottom of that form was a place for a Family Court Judge to acknowledge the signature of the natural parents. The meaning and significance of this form is clear and creates problems for no one;

(2) an extrajudicial consent form which read in pertinent part as follows:

> "I understand that in the event Consent is not executed before a Judge of the Family Court, the County of Suffolk, then and in that even this Consent shall become irrevocable thirty days after the commencement of the adoption proceeding unless written notice of revocation thereof shall be received by this Court within said thirty days" (emphasis supplied).

This is the source and the cause of all the heartbreak and confusion that followed and attention is directed to the words "in the event Consent". In the extrajudicial consent form in the case of Matter of Daniel C. (99 AD2d 35, 49 affd 63 NY2d 927), that particular phrase read: "in the event that this consent" (emphasis supplied). Moreover, relevant words of the statute upon which the extrajudicial consents in both Daniel C. and the case at bar are predicated read "the consent", etc. The fatal absence in the instant case of the modifying word "this" or "the" is not only significant

and material but clearly creates the inference, especially if both consent forms are read together as, in fact, they were, that, as Family Court found,

> "if the natural parents anticipated appearing before a judge to give their consent, the thirty day period in the extrajudicial consent form would not expire prior to the Court date. As shall be detailed subsequently, Mr. K. read the forms together and, knowing that he and his wife had to appear before a judge to give their consent for Sarah's adoption, reasonably concluded that he could revoke their extrajudicial consent at any time prior to that Court appearance";

(3) a bill of $750 plus disbursements; and

(4) a "Natural Parents" affidavit. At the bottom of this form is a place for a Family Court judge to take the oaths of the natural parents.

Mr. K. presented the forms to his wife for her signature explaining that the adoption would not be "final" until they "appear[ed] before the Court".

On November 28, 1983, the executed forms were returned to Mr. Verplank.

Let us here briefly review the role played by Mr. Verplank. He was recommended to the Ks., in all good faith, by Mrs. Marchese. His fee, $750, was his standard fee for handling complete adoptions and was paid by the Ks. The forms of consent to be signed by the Ks. were drafted and drawn by Verplank. From the time Verplank delivered the consent forms to Mr. K's. law partner until they were returned to him, Verplank gave no advice nor did he explain the legal significance attached to the signing of either or both forms. This was indeed a friendly but, as it turned out, a confusing arrangement. Mr. K. thought Verplank represented him or that he represented both sides. Verplank maintained that he represented only the

proposed adoptive parents, Mr. and Mrs. S., yet he accepted a full fee from the natural parents, Mr. and Mrs. K. Did he owe any duty to those who paid his fee?

In any event, now clearly acting on behalf of the proposed adoptive parents, on December 9, 1984, Verplank filed a petition signed by them for the adoption of little Sarah. Verplank never told the Ks. that the adoption papers had been filed.

As has oft been stated, due process of law embraces fundamental rights and immutable principles of justice; the use of the term is merely another way of saying that every person's right to life, liberty and property is to be accorded the fundamental principles of justice (see Baily v State of Alabama, 219 US 219; Ives v South Buffalo Ry. Co., 201 NY 271). From the days of the Magna Carta,

the concept of due process has mandated that, at the very least, a person not be deprived of a legitimate property or personal right without adequate notice of the possibility of such deprivation (see, Papachristou v City of Jacksonville, 405 US 156; United States v Wood, Wire & Metal Lathers Intl. Union, Local 46, 471 F2d 408, cert denied 412 US 939). I fear that that is exactly what is happening here. Unlike Matter of Daniel C., (99 AD2d 35, supra), where the natural mother admitted she was not misled by the consent form, at bar, as Family Court found, the natural parents from the very beginning were in fact deceived by the forms used and the procedures followed, and this deception deprived them of their own child without notice. To hang such a result like an albatross around the necks of these beleaguered parents would in my

opinion, be unconscionable. Accordingly, I would restore little Sarah to her natural parents.

It is a proper conclusion that the natural parents were lulled into a false sense of security that they had until the court date to finalize their consent and that because of the lack of any notice provided by the forms, they were denied due process of law. It is firmly established that a waiver of constitutional rights must be voluntarily, knowingly and intelligently made, and this should be no less true for relinquishment of parental rights than for any other liberty right (see, Johnson v Zerbst, 304 US 458; Matter of Male Infant L., 61 NY2d 420, 427; Matter of Daniel C., 99 AD2d 35, 67 [Gibbons, J. dissenting], affd 63 NY2d 927, supra; Matter of Infant S., 48 AD2d 425, 426).

Hence, in the absence of a true understanding of the terms of the adoption and its consequences, the consent of the natural parents was not free, voluntary and final (see, Matter of Unnamed Baby Boy, ___ AD2d ___ [3d Dept Apr. 25, 1985]). By granting the natural parents a "best interests" hearing, the Family Court treated them not as parents who had never given a final consent, but as if they had fully understood the terms of the adoption, fully consented and then elected to exercise their 30-day revocation right. The only appropriate remedy was to declare the natural parents' tentative "consent" a nullity ab initio and to return them to the status quo ante. To do anything less is to subject them to an on-going deprivation of due process of law (see, Matter of Unnamed Baby Boy, supra).

The Court of Appeals has noted that "[a] change of mind is to be accorded great sympathy, and, in a proper case, encouragement and favorable action *** especially *** where the natural parent has sought return within a very short time" (Matter of Male Infant L., 61 NY2d 420, 429, supra). Here, where the natural parents did not even finally and unconditionally consent to the adoption, not just sympathy, but due process requires that their decision not to go through with the adoption be given full effect and that the child be returned forthwith to their arms.

The facts at bar highlight the inherent defects in the statute (Domestic Relations Law § 115-b) in its failure to afford the natural parents notice as to when the adoption proceeding had been commenced. This is the event that sets

in motion the time clock of the 30-day period within which a revocation of consent may be filed. In that respect the statute is badly flawed and may indeed, as concluded by Justices Mangano and Lawrence, render the section unconstitutional as written (cf. Matter of Anonymous, 55 Ad2d 383; Matter of Daniel C., 99 AD2d 35, supra).

Similarly troubling, as pointed out by Justice Mangano in his plurality opinion, is the failure of the statute to rquire that the extrajudicial consent form apprise the natural parents that the timely revocation of their consent entitles them only to a best interests hearing and not to the return of their child (see also, Matter of Daniel C., 99 AD2d 35, 47-82 [dissenting opinion of Gibbons, J.] and 63 NY2d 927, 929-40 [dissenting opinion of Jasen, J.],

supra). However, in light of our factual finding that the natural parents never gave their final and unequivocal consent to the adoption of their child Sarah, we do not reach the bigger issue. We do, however, recommend the subject matter to the attention of the Legislature.

BROWN, J., concurs.

WEINSTEIN, J. (concurring in part and dissenting in part).

I note at the outset that I agree wholeheartedly with the view of my learned colleague, Justice Mangano, with respect to the fact that the natural parents clearly and unequivocally consented to the adoption of Sarah. Upon review of the record, it cannot be gainsaid that such consent was given and that the natural parents consistently

reaffirmed their decision in the weeks immediately following Sarah's birth. Nor can it reasonably be maintained that such consent was vitiated by the confusion emanating from the particular forms used. Although confusion played a significant role with regard to the natural parents' perception of the time within which to revoke the extrajudicial consent form, it had no bearing on the validity of their consent in the first place.

Without reaching the issue of the constitutionality of Domestic Relations Law § 115-b, inasmuch as I deem it improper to do so on these facts, I conclude that the real focal point of this case is whether the best interests of the child would be served by her adoption by Mr. and Mrs. S. I find, as did the Family Court that the adoption of Sarah by Mr. and Mrs. S. is in the

child's best interests. The damage which could potentially ensue by removing Sarah from all that is familiar to her, in essence, from the only family and home which she has ever known, constitutes a sufficient consideration, in my view, to justify this very difficult decision. To reach this fundamental issue, however, and evaluation of the procedural posture in which this case has reached our court is first necessary.

The natural parents in this case executed two separate forms by which they consented to the private placement adoption of the infant Sarah. The judicial consent form was to become irrevocable upon its execution before a Judge of the Family Court or a Surrogate (Domestic Relations Law §115-b [1][c]). The record reveals that said consent form was not executed in this manner. The

second form, the extrajudicial consent form, by its express terms was to "become irrevocable thirty days after the commencement of the adoption proceeding unless written notice of revocation thereof shall be received by this Court within said thirty days". Each form was signed by both of the natural parents and bore the following notation: "We came to our decision to place our baby for adoption because of her Down's Syndrome condition and our belief that the petitioners are far more capable of dealing with this condition and raising the child than we are".

On November 11, 1983, just five days after Sarah's birth, her natural father surrendered her at the hospital to the agents of the adoptive parents. Sarah has resided continuously with the adoptive parents since that date. The

adoption proceeding was commenced by the filing of a petition for adoption in the Suffolk County Family Court on or about December 19, 1983. On January 23, 1984, the Adoption Bureau of the Suffolk County Family Court sent a notice to the natural father's law partner that the matter had been scheduled for a preliminary hearing on March 1, 1984, at which he was directed to be present along with his clients, the natural parents. That notice was received by the attorney on or before January 25, 1984.

It was not until February 29, 1984 that the natural parents executed a revocation of consent to the adoption and demanded the immediate return of Sarah. Their change of heart was precipitated by a visit, some two days prior to the scheduled court hearing, to a special school in Bellmore for children afflicted

with Down's Syndrome. On the basis of their personal observations and research with regard to Down's Syndrome, the natural parents felt that they had sufficiently overcome their fears and misconceptions to enable them to accept their daughter.

Upon receipt of the adoption consent revocation, the Family Court conducted a lengthy, bifurcated hearing. The first branch of the hearing addressed the validity of the Ks'. initial consent to the adoption and the effect of their subsequent revocation.

The evidence adduced at the revocation hearing established the fact that almost immediately after learning that their baby was afflicted with Down's Syndrome, the natural parents agreed that they could not keep her. Their considerations included the possibility

of a break-up of their marriage, interference with the psychological development of their normal son, and a dramatic disruption of their lifestyle. For example, Mrs. K. would be unable to resume her career and they would be precluded from taking vacations and going to restaurants. Neither of the natural parents saw Sarah from the day of Mrs. K's. discharge from the hospital on the day after giving birth, until the time Mr. K. surrendered the infant for adoption. The natural mother expressed a desire that the adoption be resolved expeditiously inasmuch as she just "wanted to forget about the whole thing" and get on with her life.

Janet Marchese, who facilitated the adoption by acting as intermediary between the natural and adoptive parents, had requested an opportunity to consult

with both parents in order to assure herself of their familiarity with the handicap and of the numerous options available to them. The natural father replied that his wife was not up to talking but that he "had done some homework" and that the couple had already made their decision. He was adamant that they not know the names of any prospective adoptive parents, that there be no contact and that the adoption proceed immediately.

The hospital social worker with whom the natural parents had conferred suggested that they speak with someone from the Down's Syndrome School in Bellmore or with a family which already had a Down's Syndrome infant. The Ks. were, however, very determined to proceed with the adoption.

The Family Court (Hurley, J.) found that although the natural parents' decision to place Sarah for adoption was made in a state of acute emotional turmoil and despair, that decision was reaffirmed consistently in the weeks which followed the child's birth. The decision was a calculated and firm one and, in the words of the Family Court, "[t]heir initial decision to place Sarah was ratified by implication on each day that passed after the consent was executed, without objection until months after the fact".

Despite the fact that the natural parents themselves testified and submitted the testimony of various experts to the effect that the shock and trauma they suffered as a result of the birth of a Down's Syndrome infant prevented them from making a rational

decision to place the child for adoption, it has been held that mental or emotional distress or depression is generally insufficient to overturn a consent to adoption (see, Matter of Podmore v our Lady of Victory Infant Home, 82 AD2d 48, 51). Virtually all surrenders of children for adoption by natural parents involve a high degree of mental and emotional stress and no rule of law requires that consents to adoptions shall be given in an atmosphere free of such stress (see, Matter of E.W.C., 89 Misc 2d 64, 72).

The natural parents' contention that they focused upon the judicial consent form as the operative instrument in this proceeding is belied by their act of filing a revocation of consent form. A formal revocation is patently unnecessary vis-a-vis a judicial consent form which

has not been executed before a judge and is, in essence, therefore, a legal nullity (Domestic Relations Law § 115-b [1][c]). The natural parents' resort to a revocation of consent form demonstrates, not a confusion about the dual forms, but rather a recognition of the operative effect of the extrajudicial consent which they had executed and which they apparently regarded as the paramount instrument. The purported revocation was, however, untimely, inasmuch as it was not received within 30 days of the commencement of the adoption proceeding (Domestic Relations Law § 115-b [1][d][i]).

With respect to the constitutionality of the statute, Judge Hurley properly found that the natural parents lack standing to raise the issue of the failure of the statute to require

notification of the actual consequences of revocation of consent since the record reveals that they were not aggreived by either the failure of the statute to require such information or by the fact that the extrajudicial consent form employed did not contain such information (cf. Matter of Daniel C., 99 AD2d 35, affd 63 NY2d 927). In view of the language inserted by the natural parents on each of the consent forms, to wit, that they believed the adoptive parents were "far more capable of dealing with this condition and raising the child" than themselves, and given the often stated desire of the natural parents to proceed with the adoption as expeditiously as possible, it is evident that the extrajudicial consent form was knowingly and voluntarily executed and that it would have been executed even had

the form contained a full explanation of the effects of revocation.

The second branch of the natural parents' constitutional challenge is that Domestic Relations Law § 115-b fails to require that they be given notice as to when the 30-day revocation period commences. I find this contention to be similarly unavailing. It bears noting that the attorney for the natural parents received notice on January 25, 1984, that a preliminary hearing with respect to the adoption was scheduled for March 1, 1984. Notwithstanding receipt of said notification, the Ks. did not formally revoke their consent to the adoption for more than 30 days after receipt of that notice. Under these circumstances, it is unnecessary to reach the issue of whether the failure of the statute to direct that the natural parents be afforded notice of

the commencement of the adoption proceeding renders the statute unconstitutional since there was here a lack of compliance with the statutory time provisions even after they received notice of the scheduled hearing (see, Matter of Anonymous, 55 AD2d 383, 385).

Although I do not find the extrajudicial consent form executed by the natural parents to have been invalid on its face (cf. Matter of Dennis T. v Joseph C., 82 AD2d 125, appeal dismissed 54 NY2d 1024, lv denied 55 NY2d 792; Matter of Male M., 76 AD2d 839, lv denied 50 NY2d 1056), I am of the view that the due process rights of the natural parents may well have been violated and that, under the circumstances, the appropriate remedy was to treat as timely their belated attempt to revoke their consent to the adoption. That the presence of

both of the statutorily authorized consent forms resulted in some confusion is undeniable. Due to the use of dual forms, a situation could have arisen whereby the natural parents would arrive in court on the date of a scheduled hearing only to be informed by the court that the extrajudicial consent form which they had previously executed had already become irrevocable, thus obviating the purpose of the hearing. At bar, the natural parents could reasonably have believed that they had until the day of the preliminary hearing to revoke their consent. To eliminate the injustice caused by any such possibility, the process that was due to the natural parents in this case was the best interests hearing which the Family Court properly ordered (see, Matter of Anonymous, 55 AD2d 383, 385-390 [Suozzi, J., dissenting], supra).

At the best interests hearing, evidence was adduced concerning the relative abilities of the natural and adoptive parents and their extended families to care for the child, the relative merits of the specialized schooling program in which the child is now enrolled vis-a-vis the program proposed by the natural parents, the presence or absence of normal siblings in the respective households to serve as role models for Sarah, the parties' relative financial circumstances, Sarah's developmental progress to date, and the character of and commitment of the respective parties to the child. Among the factors weighing in favor of the adoptive parents are their unequivocal acceptance of Sarah from the start, their successful experience in dealing with handicapped children, their proven

ability to deal with Sarah's seizures and the active support of a grandmother who had been a teacher's aide in a BOCES program at the North Country Learning Center and a foster mother to a child with Down's Syndrome. Among the factors weighing in favor of the natural parents are their superior financial resources and the presence of two normal siblings in their household to serve as role models for Sarah.

While I do not purport to be qualified to pronounce one of the educational programs the more worthwhile in all respects or to declare that one set of parents is apodictically more competent to care for the emotional, medical and physical needs of Sarah than the other, the findings of the trial court in such matters are entitled to great weight, particularly where, as

here, those findings have a substantial basis in the evidence adduced (see, Bunim v Bunim, 298 NY 391).

With respect to the parties' remaining contentions, I note that the preponderance of the evidence standard was properly applied in this case. The "clear and convincing" evidentiary standard is mandated in State-initiated cases to terminate parental rights wherein "a near-equal allocation of risk between the parents and the State is constitutionally intolerable" (see, Santosky v Kramer, 455 US 745, 768). Unlike a neglect proceeding, a private placement adoption is not State initiated. The fact that the aid of the court has been invoked in an attempt to resolve this dispute does not suffice to convert an essentially private proceeding into a State-initiated one. The fact

that the adoption was aided, in some measure, by Janet Marchese, a resident of Westchester County who voluntarily assists in the placement of Down's Syndrome children for adoption, and who is clearly not an "authorized agency" within the meaning of Social Services Law §§ 371 and 374, does not render it invalid (see, Matter of E.W.C., 89 Misc 2d 64, 76, supra; cf. Anonymous v Anonymous, 108 Misc 2d 1098). Nor was the consent invalidated by the fact that the natural parents did not formally engage an attorney to represent them with regard to the adoption but, instead, relied in part upon the attorney for the adoptive parents. The natural father, who is himself an attorney, availed himself of the assistance of his law partner in handling certain details of the adoption. Although it is undisputed

that neither Mr. K. nor his partner specialized in family law, it cannot be said, under the circumstances, that the consent was void due to lack of adequate counsel.

My decision herein does not contravene the fundamental tenet that the "'right of the natural parents to the care and custody of their child' is 'basic'" (Matter of Anonymous, 55 AD2d 383, 385, supra, quoting from Skinner v Oklahoma, 316 US 535, 541). Although I bemoan the stringency of the statutory time requirements and commiserate with the natural parents, I am also cognizant of the need to recognize the significance and finality of consents to adoptions. These consents, as the products of an ofttimes emotional and painful soul searching, cannot possibly be taken lightly. At risk is the welfare and

emotional stability of an innocent and vulnerable infant, not to mention that of the adoptive family into which that infant has already begun to assimilate. Upon review of the evidence, I therefore decline to disturb the Family Court's decision, made after a best interests hearing, authorizing the adoption of Sarah by Mr. and Mrs. S.

Accordingly, I vote to affirm the dispositional order of the Family Court, Suffolk County, dated November 7, 1984, which, at the conclusion of the best interests hearing, refused to give effect to the notice of revocation of consent and, in effect, granted the adoption petition. However, I concur with my colleagues in voting to dismiss the appeal and cross appeal from the order dated September 24, 1984, inasmuch as no appeal lies as of right from a

nondispositional order of the Family Court (Family Ct Act § 1112).

As a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on August 19, 1985

HON. GUY J. MANGANO, Justice Presiding,

HON. RICHARD A. BROWN,
HON. FRANK D. O'CONNOR,
HON. MOSES M. WEINSTEIN,
HON. CHARLES B. LAWRENCE, Associate Justices

In the Matter of Sarah K. (Anonymous).

Timmy S. (Anonymous), et al.

Appellants-respondents;

Warren K. (Anonymous), et al.,

Respondents-appellants;

Robert Abrams, Attorney General,

Intervenor-respondent.

ORDER

In the above entitled action, the above named Timmy S. (Anonymous), petition, and the above named Warren K. (Anonymous), et al., respondents in the court below, having cross appealed to

this court from a nondispositional order of the Family Court, Suffok County, dated September 24, which deemed a notice of revocation of an extra-judicial consent to an adoption, signed by the natural parents of the infant in question, to have been timely given, and directed that a hearing be held to determine the best interests of the child required that the notice be given effect and thereupon the infant be returned to her natural parents or that a petition for her adoption be granted, and the above named Warren K. (Anonymous), et al., respondents having appealed to this court from a dispositional order of the same court, dated November 7, 1984 and made after said best interests hearing, which refused to give effect to the notice of revocation of consent petition; and the said appeals having been argued by Frederick J. Magovern, Esq., of counsel

for appellants-respondents, argued by Katherine G. Thompson, for respondents-appellants and argued by Robert J. Schack, Esq., for intervenor-respondent pro se in support of the constitutionality of Domestic Relations Law § 115-b; due deliberation having been had thereon; and upon OPINION by MANGANO, J.P., and this court's decision slip, heretofore filed and made part hereof, it is

ORDERED that the appeal and the cross appeal from a nondispositional order dated September 24, 1984, is hereby dismissed, without costs or disbursements, and it is further

ORDERED that the order appealed from dated November 7, 1984 is hereby reversed, without costs or disbursements, nondispositional order dated September 24, 1984 is hereby vacated, it is

declared that the judicial and nonjudicial contes to adoption signed by the natural parents were void ab initio, adoption and petition denied, and the matter is hereby remitted to the Family Court, Suffolk County, for the entry of an order in its discretion providing for the transfer of custody of the infant from the adoptive to the natural parents as expeditiously as possible.

MANGANO, J.P., and LAWRENCE, J., concur, both noting that their votes to reverse the order dated November 7, 1984, are on the law.

O'CONNOR, J., concurs separately in an opinion in which BROWN, J. concurs, both noting that their votes to reverse the order dated November 7, 1984, are on the law and the facts.

WEINSTEIN, J., concurs to dismiss the appeal and cross appeal from the oder dated September 24, 1984, but dissents as to the order dated November 7, 1984, and votes to affirm the same, with an opinion.

Enter:

IRVING N. SELKIN
Clerk of the Appellate
Division

A-109

MEMORANDUM

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of the Adoption
of SARAH KOSHER
Adoptive Child

By HURLEY J.

Dated 18 September 1984
Docket # A-25-84

Katherine Thompson, Esq.
Attorney for Natural Parents
475 Fifth Avenue
New York, New York 10017

David H. Verplank, Esq.
Attorney for Adoptive Parents
282 Newbridge Road
Hicksville, New York 11801

- -

This is a private placement adoption proceeding within the meaning of Domestic Relations Law Article VII, wherein the natural parents of a child born in wedlock seek to revoke an "extrajudicial" adoption consent which they executed in November 1983, pursuant to Domestic Relations Law Section 115-b. Although

governed by statute and guided by a plethora of case law, this proceeding presented a tragic scenerio [sic] of misguided practices which should rightfully sound the alarm for reform of the adoption procedures in this state. Indeed the present litigation, like Matter of Daniel C., 99 App.Div. 2d 35 (2nd Dep't 1984), and a host of like cases, are at least in part the product of the confusion which pervades the adoption forms and procedures in New York State. This issue, and the Court's respectful call for legislative review, will be discussed in greater detail subsequently. Suffice it to say at this point, that although Domestic Relations Law Article VII may pass constitutional muster, it is far from a model of legislative clarity, and its administrative implementation has caused grave, and, I believe, unnecessary

hardship to many natural and adoptive parents, to say nothing of the children at the center of such controversies.

While some of the legal questions before the Court are complex (particularly whether the Koshers were denied due process), the facts are relatively straightforward and, in large measure, undisputed. Before discussing those facts, however, one further preliminary observation is in order. At the beginning of the protracted hearing in this matter, it was agreed that the trial would be bifurcated. The first stage would consider the validity of the Koshers' initial consent to the adoption, and the effect of their subsequent revocation of that consent. Depending on the outcome of that stage of the case, a "best interest" hearing, pursuant to Domestic Relations Law Section 115-b, 3 (d), would be held if necessary. The

first stage of the case has been completed, and this opinion pertains solely to that stage.

FACTS

Warren and Christine Kosher are the natural parents of Sarah Kosher, who was born November 6, 1983, at North Shore University Hospital.

Mr. Kosher is a lawyer who served as an assistant district attorney in Brooklyn, and then as counsel in the New York City Mayor's Office, before entering private practice in Manhattan, with two other young lawyers, approximately three years ago. Christine Kosher has a Bachelors of Science degree in education, plus graduate school credits. Prior to Sarah's birth, she had been employed both as a teacher, and as an executive of a major retail establishment. The Koshers have one other child, a healthy four year old son.

Sarah was born at 12:30 p.m. on November 6th, with Warren Kosher present. The child weighed 9 pounds, 5 ounces and appeared to her parents to be healthy. However, shortly after her birth, the obstetrician who delivered Sarah entered the recovery room and told the Koshers that he believed their baby was "a mongoloid" (i.e. had Down's Syndrome), which diagnosis was confirmed by a hospital pediatrician and geneticist.

As soon as the (obstetrician) had essentially devastated the Koshers by his matter-of-fact pronouncement concerning Sarah's condition, and exited the recovery room, the Koshers concluded that they could not keep the baby. The next day, November 7th, they informed a hospital social worker of their decision, and obtained from her a list of three agencies to contact to arrange for Sarah's adoption. In addition to the

three agencies listed, the social worker gave the Koshers the name of Janet Marchese and suggested that possibly she could be of assistance since she had found adoptive homes for many other Down's Syndrome children over the years.

On November 7th, Christine Kosher was discharged from the hospital with Sarah staying behind. Later that day, Warren Kosher called the listed agencies, one of which again mentioned Janet Marchese. He then called Mrs. Marchese. She was not home when he first called at around 4:00 p.m. on November 7th. However, he called back, and reached her at 9:30 p.m. that evening. He told her what had happened, and asked her to help them find a home for Sarah. She asked Mr. Kosher if he "was sure that is what he wanted to do" and he replied in the affirmative.

At this point, let us digress for a moment and discuss Janet Marchese. This married mother of five (three adopted, including one child with Down's Syndrome) is a full time humanitarian who "moonlights" as a part time waitress. Starting in 1977, she has been involved in the adoptions of 600 to 700 Down's Syndrome children, with 100 of that number being private adoptions, and the remainder agency adoptions. In each instance, she serves as an intermediary, never taking physical custody of a child. She maintains a list of prospective adoptive parents who have approved home studies, which fact she verifies with the appropriate authorized agency. She also has a list of natural parents wishing to find adoptive homes for their children. Her office is in her kitchen, her desk is her kitchen table. She never charges for her services, although she does on

occasion ask for a donation from a natural parent following an adoption. Whether she asks or not depends in part on how far in the red her "shoe string operation" is at the particular time.

Although she receives no financial benefits for her involvement with Down's Syndrome children, her efforts have not gone unnoticed. Articles about her work have appeared in a number of national periodicals, including Parents Magazine, and she has appeared on the Good Morning American television show on two occasions. Moreover she receives a $200.00 a month grant from the Joseph P. Kennedy Foundation which is applied towards her telephone bills.

Having briefly reviewed Mrs. Marchese's background, let us continue with the November 7th telephone contact between Mr. Kosher and her, and the events thereafter.

Mrs. Marchese testified, and the Court so finds, that when Mr. Kosher called her he wanted her help in finding an adoptive home for Sarah, and nothing more. When Mrs. Marchese began to mention other alternatives, he said he had "done his homework", that he was "sure of their decision", that neither he nor his wife wanted to meet with prospective adoptive parents, and that he "wanted this done immediately".

On November 8th, Janet Marchese told Warren Kosher that she found a couple to adopt Sarah, Timmy and Lisa Stamatis. She testified that she asked Mr. Kosher to pay the legal fee for the attorney for the adoptive parents, David Verplank, Esq.. Mrs. Marchese indicated that she typically makes this request of natural parents since the adoptive parents will, in all probability, incur significant medical bills for the youngster following

the adoption. Mr. Kosher agreed to pay Mr. Verplank's legal fee, and, according to Mrs. Marchese, told her that his law partner would represent him. Mr. Kosher, on the other hand, testified that he was simply asked to pay the legal fee, for the reason Mrs. Marchese cited, and he assumed that Mr. Verplank either represented him and his wife, or was representing both the adoptive and natural parents in what was then an uncontested adoption. Mr. Kosher said at trial that his partner did not act as his attorney, but rather as his friend who dealt with Mr. Verplank to buffer the Koshers from the anxiety and grief that the whole situation entailed.

I find that Mr. Kosher's only interest at the time was to have the adoption expedited. He assumed that Mr. Verplank had the expertise to accomplish that result, regardless of whom he

technically represented which was of no particular significance to Mr. Kosher at the time. I also find that Mr. Verplank did not believe that he represented the Koshers, notwithstanding the fact that he permitted them to pay his fee pursuant to the suggestion of Mrs. Marchese. This issue will be discussed more fully subsequently.

In any event, later in the day on November 8th, Warren Kosher called his law partner, Bruce Regenstreich, and asked him to contact Mr. Verplank, which was done.

Mr. Verplank drafted the adoption consent forms for Warren and Christine to sign, and made arrangements for Sarah's transfer from the hospital to the adoptive couple. On November 11, 1983, five days after Sarah's birth, Warren Kosher went to the hospital with Bruce Regenstreich and handed Sarah to a nurse

who had accompanied Mr. Verplank for purposes of the transfer. The consent documents prepared by Mr. Verplank were given to Mr. Regenstreich in an envelope. After the transfer, Mr. Kosher and Mr. Regenstreich returned to the Kosher home. At that point, Mr. Regenstreich gave his law partner the envelope absent any discussion of its contents. According to Mr. Kosher, the envelope, and its contents were then placed in his desk, where they remained until the weekend after Thanksgiving (e.g. November 26 and 27, 1983). Included within the envelope were the following items:

1) a judicial consent (petitioner's exhibit 1, in evidence) which becomes irrevocable when "executed or acknowledged before a judge . . . ." Domestic Relations Law Section 115-b (1) (c). At the bottom of that form is a place for a Family Court Judge to

acknowledge the signature of the natural parents, after he has performed his statutory duty of explaining to them in detail the irreversible consequences of their act. Domestic Relations Law Section 115-b (2).

(2) an extrajudicial consent (petitioner's exhibit 4, in evidence), which provides in pertinent part as follows:

> "I understand that in the event Consent is not executed before a Judge of the Family Court, the County of Suffolk, then and in that event this Consent shall become irrevocable thirty days after the commencement of the adoption proceeding unless written notice of revocation thereof shall be recieved by this Court within said thirty days". Emphasis supplied.

Parenthetically, please note that the extrajudicial consent form presented to the Koshers differs in a slight, but material way from that involved and set forth in the Matter of Daniel C., supra, 99 App.Div.2d at page 49. The Daniel C.

consent provides that in the event "this consent is not executed before a Judge", then it becomes irrevocable thirty days after the commencement of the adoption proceeding. Emphasis supplied. The subsection of the statute upon which the extrajudicial consents in both Daniel C. and in the present case are predicated, read "such consent". Domestic Relations Law Section 115-b, (1) (d) (i). Emphasis supplied. No such modifier as "this" or "such" precedes the word "consent" in the Kosher extrajudicial consent form, thereby creating the inference that if the natural parents anticipated appearing before a judge to give their consent, the thirty day period in the extrajudicial consent form would not expire prior to the Court date. As shall be detailed subsequently, Mr. Kosher read the forms together and, knowing that he and his wife had to appear before a judge to give

their consent for Sarah's adoption, reasonably concluded that he could revoke their extrajudicial consent at any time prior to that Court appearance.

3) a bill for $780.00 from David Verplank, Esq., consisting of a $750.00 legal fee and a $30.00 "escort fee" for the nurse that took delivery of Sarah on November 11th at the hospital. Petitioner's exhibit 7, in evidence.

4) a "natural parents" affidavit. Petitioner's exhibit 13, in evidence. At the bottom of the form is a place for a Family Court Judge to acknowledge the signatures of the natural parents.

Upon opening the envelope and reviewing its contents sometime during the weekend immediately after Thanksgiving 1983, Mr. Kosher concluded that nothing was final until he and Christine appeared in Court. This opinion was based on a perusal of the

consent forms and parents affidavit, coupled with what he had previously been told by Bruce Regenstreich about the prospective Court appearance. Neither Warren Kosher, nor either of his two partners had any experience or prior knowledge concerning adoptions.

After reviewing the documents, Mr. Kosher presented them to his wife for her signature. He explained to her, in substance, that the adoption would not be "final" until they "went before a judge".

On November 28, 1983, Warren Kosher returned to work, and delivered the envelope, with all of the enclosed forms signed, to Bruce Regenstreich. Shortly thereafter, Mr. Regenstreich told him that he had sent the forms to Mr. Verplank. Mr. Kosher thereafter often asked his partner to see if the Court appearance had been scheduled. In January 1984, Mr. Kosher learned from

Bruce Regenstreich that the Court date was scheduled for March 1st.

Mrs. Kosher testified that on a number of occasions she and Warrren asked each other "Are you sure?" Then in February 1984, she began "to face the reality of the situation". Until she learned of the Court date, she "always cried for (herself)". Thereafter, her focus shifted to Sarah, and she decided that she wanted the child returned. Towards the end of February, 1984, she visited a school for Down's Syndrome children. She learned of the programs available for such children, and began to understand that her husband and herself were "not alone". She believed, based on conversations with her husband, that their decision to place Sarah for adoption could be revoked anytime prior to the Court date. She viewed that date as "a door", after which she "could not

get Sarah back".

On February 28, 1984, Warren Kosher told Bruce Regenstreich: "Chris and I don't want to go through with this". Mr. Regenstreich replied that he would check to see how the adoption proceeding could be terminated. After contacting the clerk's office in the Suffolk County Family Court to learn the revocation procedure, Mr. Regenstreich explained to Mr. Kosher that a revocation of adoption form had to be executed. Mr. Regenstreich also told Mr. Kosher that the March 1, 1984, scheduled Court appearance had been cancelled.

On February 29, 1984, Messrs. Kosher and Regenstreich prepared a revocation of consent form, which was signed by the natural parents and forwarded to the Court. Petitioner's exhibit 10, in evidence. The form was received by the Court on March 2, 1984. Thereafter the

adoption consent revocation procedures outlined in Domestic Relations Law Section 115-b were followed with the matter ultimately being calendared before the undersigned on March 21, 1984. A lengthly trial ensued, with decision being reserved upon its completion on June 11, 1984.

In a pre trial memorandum (which also served to notify the adoptive parents of the precise contentions of the Koshers), the natural parents urge several grounds for the revocation (and voiding) of their written consent to the adoption of their daughter Sarah:

1) They allege that the extrajudicial consent executed in November 1983, is void due to duress in its execution;

2) They assert that the adoption proceeding must be dismissed and their child returned to them due to alleged

violations of Social Service Law Section 374, which Section deals with illegal placements;

3) They attack the validity of the extrajudicial consent form executed by them in November 1983, on the basis of lack of counsel, and on the constitutional ground that while the form provides that it shall be irrevocable thirty days after the "commencement" of the adoption proceeding, there is no mechanism in the enabling statute or the administrative procedures in Suffolk County, to inform the natural parents when the "clock starts to tick" via the commencement of the proceeding. It is argued that the gap in the notification procedure denied the Koshers due process. In addition the natural parents contend that the revocation language in the extrajudicial consent form is misleading for it implies that timely service of a

revocation notice will automatically produce the return of the child, which, in fact, would only be the case if prospective adoptive parents do not contest the return. This alleged defect is claimed to be of constitutional magnitude.

Each of the grounds urged by the Koshers shall be addressed seriatim.

DURESS

Article VII of the Domestic Relations Law (Section 109 et.seq.) regulates and governs the procedures to be followed in all adoption proceedings commenced in this state. Section 115-b (1) (c) and (d) of that statute provides, inter alia, that a natural parent may consent to a private placement adoption of his or her child in one of two ways: by properly executing an extrajudicial consent form and/or by executing an adoption consent before a judge of a

Court of competent jurisdiction. The latter becomes irrevocable upon its execution in the Court; the former is irrevocable thirty days after the adoption proceeding has been commenced. With respect to an extrajudicial consent executed pursuant to subsection 1 (d) of Domestic Relations Law Section 115-b, a revocation within such 30 day period will result in a custody hearing if the adoptive parents object to the return of the child. At such a hearing, the natural parents and adoptive parents stand on equal grounds relative to their custodial claims.

The procedures, issues and nuances of a revocation of an extrajudicial consent have been exhausingly discussed in several major appellate decisions in this state and need not be recounted at this time. See, Matter of Daniel C. 99 App.Div.2d 35 (2nd Dep't 1984); Dennis T.

v. Joseph C., 82 App.Div.2d 125 (2nd Dep't 1982); Matter of Anonymous, supra, dissent by Gibbons, J. and Matter of Anonymous, supra, dissent by Suozzi, J..

In the proceeding at bar, the record is clear that the adoption proceeding was filed and commenced on December 16, 1983; the revocation notice of the natural parents was not filed until March 2, 1984, some 76 days later.

While Section 115-b (1) (d) (i) provides that a revocation must be filed within 30 days if it is to be given force and effect, subsection 4 of that statute states:

> ". . . this section (shall not) bar actions or proceedings brought on the ground of fraud, duress or coercion in the execution or inducement of an adoption consent".

Accordingly, irrespective of the number of days which may pass after the filing of an adoption proceeding, a natural parent maintains the right to

attack an adoption consent if fraud, duress or coercion was present in its inducement or execution. Mr. and Mrs. Kosher have asserted precisely that, and they pray for a declaration of invalidity of their adoption consent on that basis.

While the existance of duress in the execution of an adoption consent may void same and result in the return of the child, such duress must be of the quality and nature that it overrides the parents ability to make an intelligent and knowing decision to place their child for adoption. Indeed, an adoption consent executed under the cloud of duress is no consent at all. However, as was stated by then Nassau County Surrogate Bennett in Matter of T.W.C., NYLJ December 18, 1974, and restated by the Surrogate in Matter of E.W.C., 89 Misc.2d 64 (1976):

> "'Contemplation of the surrender of one's own child is in many, if not all, cases a cause of emotional and

> mental stress . . . . no statute has said that surrenders are valid only if executed free from emotion, tensions and pressures caused by the situation. No principle of law requires the rule'".

Although Mr. and Mrs. Kosher presented substantial evidence of their shock, despair and depression relative to the birth of their Down's Syndrome daughter, and while the Court fully appreciates the trauma that engulfed them at the time of Sarah's birth, I nonetheless do not find that their adoption consent was tainted and otherwise vitiated by recognizable duress. In this regard, the Court notes the following:

a) The Koshers (both intelligent, educated and mature adults) were not pressured or importuned by third persons to surrender their child for adoption. Compare In re Emanual I., 365 N.Y.S. 2d 709 (F.C., N.Y. Co. 1975).

b) The Koshers' decision to place Sarah, while initially made in a state of despair and confusion, was reaffirmed consistently during the weeks which passed after the child's birth. Indeed, according to Mr. Kosher's trial testimony, their adoption consent was executed on either November 26 or 27, i.e. almost three weeks after the birth of Sarah. By that time Mr. Kosher had returned to work, and the couple had taken a brief trip to New England in an effort to escape their sadness. There is no question that the Koshers were in the midst of acute emotional turmoil for a considerable period of time following Sarah's birth. But there is insufficient credible

evidence in the record to support the conclusion that their grief rendered them incapable of making a rational, although difficult, decision towards the end of November to place Sarah.

c) The decision to place Sarah for adoption was essentially a calculated and firm one; the parents did not suffer from indecision or ambivalence. Evidence of this is found, inter alia, in the aggressive manner in which Mr. Kosher obtained the necessary information at the hospital to effect placement, and how that demeanor carried through in his contacts with Mrs. Marchese. Mrs. Kosher's frame of mind was similar to that of her husband. She

initially wanted the child placed, and remained steadfast in that view until February 1984.

d) Their initial decision to place Sarah was ratified by implication on each day that passed after the consent was executed, without objection until months after the fact.

ILLEGALITY OF PLACEMENT

The natural parents also assert that the entire adoption proceeding must be dismissed and their child returned to them due to alleged violations of the Social Services Law regarding placement of children for adoption. In this regard, Mr. and Mrs. Kosher contend that Janet Marchese, the person whom they contacted on November 7, 1983, and who located the adoptive couple for the child, had acted illegally in "placing

out" Sarah for adoption, in violation of Social Services Law Section 374.

Social Services Law Section 374 states, in part, that:

> "2. No person agency, association, corporation, institutions, society or other organization except an authorized agency shall place out or board out any child, but the provisions of this section shall not restrict or limit the right of a parent, legal guardian or relative in the second degree to place out or board out a child".

Section 371 (12) defines the term "place out" as follows:

> ". . . . to arrange for the free care of a child in a family other than that of the childs parent, step-parent, grand-parent, brother, sister, uncle or aunt or legal guardian, for the purpose of adoptive or for the purpose of providing care".

As was noted in the factual discussion, supra, Janet Marchese is a private person who is actively involved in the process of the adoption of children with Down's Syndrome who are

unwanted by their natural parents. It is undisputed that she is not an "authorized agency" as that term is used in Section 374 (2), or defined in Section 371 (10). Her name was provided to Warren Kosher the day after Sarah was born and he contacted her for the singular purpose of locating an adoptive couple for his disabled daughter. Mrs. Marchese testified at length in Court and fully explained her role in this matter. She referred the Koshers to attorney Verplank, she located the adoptive couple who ultimately received Sarah, and essentially set the wheels in motion for the adoption. The activities of Janet Marchese were prompted solely by the deliberate request of the natural parents, who turned to Mrs. Marchese as a concerned and available resource for the adoption of their child.

The placement issue raised by the Koshers is two pronged:

1) did Janet Marchese's activities constitute an improper "placing out" of Sarah within the meaning of Social Services Law Section 374?, and

2) if so, is the appropriate remedy in this case the dismissal of the adoption petition of Timmy and Lisa Stamatis?

The Court concludes that Mrs. Marchese did not violate Section 374. She acted as an agent of the natural parents, empowered by their authority and behaving at their request. If Section 374 does not prohibit a parent from "placing out" a child, it surely does not prohibit such placement by a person appointed by the parent, assuming no fees or improper practices are present. Mrs. Marchese charged no fee, and never took possession of Sarah. The adoptive

parents that she found for Sarah already had approved home studies prepared by an authorized agency. She was simply an intermediary, acting at the request of the Koshers.

In conclusion of this point, I find that Mrs. Marchese's efforts in helping the Koshers find an adoptive home for Sarah were not violative of Section 374. In this regard, the Court is not unmindful of the two decisions offered by the natural parents relative to the issue of illegal placements, to wit, Anonymous v. Anonymous, 439 N.Y.S.2d 255 (S.C. Queen Co. 1981) and Matter of Anonymous, 46 Misc.2d 928 (F.C. Dutchess Co. 1965).

A perusal of the former case reveals that the Section 374 issue was dictum, and that the child was returned to the 16 year old natural mother because of her signing of a void pre-birth adoption consent. Moreover the third party in

that transaction, whose activities the judge found objectionable, was an attorney in the employ of the prospective adoptive parents, and who initiated the contact with the natural mother. That attorney, unlike Mrs. Marchese in the present case, clearly could not be considered as an agent acting on behalf of the natural parent. Thus the Section 374 dictum in Anonymous v. Anonymous, supra, is inapposite to the case at bar.

The second case cited above, viz. Matter of Anonymous, supra, is an unusual case. Judge Jiudice, sua sponte, denied an adoption petition where there was no revocation attempt, solely on the basis that an attorney brought the natural mother and adoptive couple together. This, the Court opined, was illegal. Although there are a number of significant factual distinctions between the activities of the attorney-

intermediary in Matter of Anonymous, supra, and those of Mrs. Marchese in the present case, Judge Jiudice's holding is very broad, erroneously so in my view. Consequently, I have declined to adopt his rationale. The Matter of Anonymous holding, if law, would signal the death knell for the great bulk of private placement adoptions in this state.

Let us now consider the second prong of the natural parents' illegal placement argument, i.e. that the appropriate remedy for a Section 374 violation is the dismissal of the adoption petition and immediate return of the child. To adopt such a rule would cause hardship for many persons involved in pending private placement adoptions, and conceivably could call into question the legitimacy of a multitude of consummated adoptions.

Fortunately, the problem may be addressed in a less disruptive fashion.

Any violation of Section 374 is a crime under Social Services Law Section 389. Moreover, any individual or organization that engages in prohibited placement activities may be enjoined by the State in the Supreme Court from so acting, pursuant to the authority set forth in Social Services Law Section 391 and CPLR Article 63. Since such mechanisms exist to promptly correct such matters, the wisdom of the Courts of this state, inter alia, derailing otherwise sound adoption proceedings on this ground alone is questionable. The following excerpt from Surrogate Bennett in Matter of Adoption of E.W.C., 389 N.Y.S.2d 743, 752 (Surr. Ct. Nassau Co. 1976) is on point:

> "Social Services Law Section 374 (6) is of the criminal-sanction type in that it attempts to prohibit the evils of baby-selling by making such activity a crime (Social Services Law Section 389 (2). Even if, as the natural mother contends, the New York attorney in cooperation with the Florida attorney illegally

> placed out this child for compensation, the law makes this a criminal act for which criminal sanctions are prescribed. While Matter of Anonymous, 46 Misc.2d 928, 261 N.Y.S.2d 439 came to the opposite conclusion, this court is of the opinion that the adoption itself should not be refused because of a possible violation of a law which calls for a criminal sanction . . . ."

I find that even if, arguendo, Mrs. Marchese's activities did violate Section 374, the appropriate remedy is not to dismiss the adoption petition.

In conclusion, the natural parent's application for a dismissal of the adoption proceeding, and the return of Sarah, based on the alleged illegal placement, is denied.

LACK OF COUNSEL

The Koshers also urge that they should be permitted to revoke their extrajudicial consent to Sarah's adoption upon the ground that "they did not have the benefit of adequate counsel to help

them understand the legal consequences of the documents signed by them". See trial memorandum for Warren and Christine Kosher, page 1.

Of course, lack of counsel is not an independent ground to invalidate an extrajudicial consent form otherwise properly executed. Rather it is merely a factor to consider in determining whether "fraud, duress or coercion . . . (was present) in the execution or inducement of an adoption consent". Domestic Relations Law, Section 115-b (4). However whether viewed as an independent ground, or as part of a fraud, duress or coercion claim, the argument lacks merit.

Mr. Kosher is a practicing attorney in Manhattan, and far from a neophyte. Granted, he had no prior experience in adoption matters. However, the adoption consent forms in issue contain the Section of the Domestic Relations Law

upon which they are predicated. Mr. Kosher, or one of his law partners could have readily reviewed the relevant statutes if he had desired clarification of the forms and procedures applicable to Sarah's adoption.

Mr. Kosher did not seek clarification or guidance vis a vis his right to revoke because neither he nor his wife had any interest whatsoever in reversing their course of action until late February 1984.

That Mr. Kosher, and his law partner, Bruce Regenstreich, had the ability to understand adoption law, if so motivated, is evidenced by the fact that they properly prepared, and expeditiously filed a Revocation of Consent form as soon as the decision to seek Sarah's return was made.

The circumstances surrounding the Revocation of Consent also sheds light on

the argument that the Koshers believed that David Verplank was their attorney. When they decided to revoke their consent, Mr. Verplank was not contacted. Rather Mr. Kosher and Mr. Regenstreich prepared the necessary documents in their law office.

This Court unequivocally condemns the practice employed in this case of having the natural parents pay the legal fee of the attorney for the adoptive parents. Such a practice is unacceptable for it creates an aura of confusion as to who represents whom. Yet the evidence adduced at trial indicates that Mr. Verplank did not represent the Koshers, nor did they rely upon him for legal advice or consider him to be their attorney. Therefore, their consent to Sarah's adoption may not be invalidated on that ground.

CONSTITUTIONAL CLAIMS

The final argument of Mr. and Mrs. Kosher is a multi-faceted constitutional attack on the form of the extrajudicial adoption consent which they signed in November 1983, the statute upon which that form is based (i.e. Domestic Relations Law Section 115-b), as well as the manner in which the form was executed. Briefly summarized, they posit the following in this regard:

a) They contend that they were deprived of due process relative to notice of when their 30 day revocation period began and ended.

b) They submit that the statute is unconstitutional inasmuch as it fails to properly advise consenting parents of the results of revocation.

c) They claim that they were mislead by the procedures followed and accordingly viewed their written consent as "tentative" only, pending their scheduled Court appearance.

A. Lack of Notice re Commencement of Thirty Day Period Within Which to Revoke Consent.

The Court again notes that an adoption consent executed pursuant to Domestic Relations Law Section 115-b may be unilaterally revoked at any time prior to thirty (30) days after the commencement of the adoption proceeding. The failure to timely file a revocation notice under the statute results in the consent being irrevocable unless fraud, duress or coercion are later established (Domestic Relations Law Section 115-b (4)). Again, the scheme of Domestic Relations Law Section 115-b and the policies behind it have been exhaustively discussed by our Appellate Division and need not be restated at this juncture. See, Matter of Daniel C., supra; Dennis T. v. Joseph C., supra; Matter of Anonymous, supra; Matter of Male M., 76 App.Div.2d 839, 428 N.Y.S.2d 489 (2nd

Dep't 1980).

In the instant revocation proceeding, the natural parents signed a revocation of consent form, which document was received by the adoption bureau of this Court on March 2, 1984. Petitioners' exhibit 10, in evidence. The adoption proceeding was commenced, however, more than two months earlier, viz. on December 19, 1983. The opposing adoptive parents urge that since far more than 30 days had passed, the consent has ripened into an irrevocable one, thereby requiring rejection of the parents' revocation attempt.

Unfortunately, the answer to the question of whether the natural parents' revocation was timely may not be found by simply counting days. The Koshers were not notified when the adoption proceeding was commenced, and, therfore, were unaware that the "meter was running" on

their thirty day revocation period. This is not surprising, perhaps, since:

> "Except for the requirement that the consent spell out the fact that it becomes irrevocable 30 days after the commencement of the adoption proceeding (Domestic Relations Law, Section 115-b, subd. 1, par. (d)), there is no further provision for notice to the parents of the date the petition is filed". Matter of Anonymous, 55 App.Div.2d 383, 390 N.Y.S.2d 433, 434 (2nd Dep't 1977).

Not only is Section 115-b devoid of a notice requirement, but the procedures by which the statute is administered in Suffolk County similarly does not provide for notice.

Notwithstanding the strong presumption in favor of a statute's constitutionality, and the fact that the presumption may not be repelled except by proof beyond a reasonable doubt (Wasmuth v. Allen, 14 N.Y.2d 391 (1964); Levitt v. Sands Point, 6 N.Y.2d 269 (1959)), such a distinguished jurist as Justice Suozzi believes that the notice deficiency

constitutes a denial of due process. Matter of Anonymous, supra, 390 N.Y.S.2d at p. 436.

Perhaps the constitutional defect is not in the statute, but rather in its implementation. Indeed, it is reasonable to assume that the legislature expected that such notice would be furnished to a natural parent by the particular Courts in whatever fashion those Courts felt appropriate. See, Domestic Relations Law Section 111 (3). ("Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct . . ."); cf. 16A C.J.S. "Constitutional Law", p. 802 ("Statutes regulating . . . liability must provide reasonable notice . . .; but a statute will not be held unconstitutional for failure expressly to provide for notice, if the requirement of notice may be fairly implied from a consideration of

all its provisions, and according to some authorities is to be implied from the very fact it is a constitutional requirement, irrespective of particular provisions in the statute under which the proceeding is had").

But whether the problem is traceable to Section 115-b, or its administrative implementation, or both (as I believe is the case), it seems clear that the present scheme - which effectively results in a termination of parental rights after the passage of a certain time period, but provides no notice as to when the period begins - violates due process.

In the present case, however, the Koshers were not aggrieved by the notification defects in the statute or its implementation, and thus lack standing to benefit from the constitutional infirmities. On January

23, 1984, Mr. Regenstreich, the Koshers' agent and attorney, was advised by the adoption bureau that the petition had been filed and that the Court date was scheduled for March 1, 1984. Yet the Koshers waited more than 30 days after receiving that belated notice before they endeavored to revoke their consent. Such being the case, the delay in giving them notice until January 23rd did produce a violation of their constitutional rights. The Koshers' situation is analagous to that of the natural parents in Matter of Anonymous, supra, as indicated from the following excerpt from that opinion:

> "Under the facts of this case we need not reach the question of the constitutionality since, even after the appellants recieved notice of the hearing on December 12, 1975 (i.e. approximately a month after the proceeding was commenced), they did not formally move to revoke their consent until February 3, 1976, more than 50 days after the receipt of such notice. Under such circumstances, I cannot but find that the attempted revocation was

ineffective". 390 N.Y.S.2d at p. 435.

B. Absence of Information Advising Natural Parents of Nature of Right to Revoke.

A plain reading of the extrajudicial consent form indicates that natural parents may revoke their consent within the thirty day period, in which case one would think that their child would be returned to them. Of course, as we know the plain meaning of the consent form is not its true meaning. Revoking parents may or may not receive their child back, depending on the position taken by the prospective adoptive parents and the outcome of a possible "best interest" hearing.

The Koshers claim that the failure of the consent form to fairly state the nature of a parent's revocation rights is fatal to its validity. The opinion of the Appellate Division, Second Department

in Matter of Daniel C., supra, however, indicates to the contrary. As explained by Justice Lazer, writing for the majority, the consent form need not explain the nature of the revocation right. Moreover, the natural mother of Daniel C. did not have standing to question the constitutionality of Section 115-b since the record demonstrated that the form had been thoroughly explained to her. She, therefore, had "suffered no injury in fact from the allegedly misleading language in the consent form nor had she been otherwise prejudiced by the assertedly unconstitutional feature of Section 115-b". 99 App.Div.2d at p. 42.

From a juxtapositioning of the present facts with the holding in Matter of Daniel C., supra, we see that the Koshers' attack on the extrajudicial consent form (as distinct from the

statute itself) is without merit, and that they lack standing to question the constitutionality of Section 115-b.

The lack of standing arises because the misleading revocation language in the extrajudicial consent form had no bearing on the Koshers' execution of the instrument. At the time in question, they were unwavering in their determination to have Sarah placed. There is absolutely nothing to suggest that they would not have signed the consent had they fully understood the revocation procedures. In fact, the evidence demonstrates precisely the contrary. Their sole concern until late in February 1984, was to have the edoption consummated so they could proceed with their lives. Their decision to sign the extrajudicial consent form was not induced, or in any way influenced by the now challenged failure of the form

to fully describe their revocation rights. Consequently the Koshers' consent to Sarah's adoption may not be invalidated on this ground for they, like Daniel C.'s mother, "suffered no injury in fact from the allegedly misleading language of the consent form". Emphasis supplied.

C. Language of Extrajudicial Consent Form, Together With The Manner in Which it Was Presented to The Natural Parents Led The Koshers to Reasonably Conclude That Their Extrajudicial Consent Could be Revoked at The Court Appearance, or Anytime Prior Thereto.

The Koshers claim that their consent to Sarah's adoption, as expressed in the extrajudicial consent form, was understood by them to be tentative. Of course, "mistake" is not one of the grounds listed in subdivision 4 of Section 115-b, to void a consent after the 30 day period has passed. However, if the Koshers' time to revoke their

consent expired under circumstances which constitute a denial of due process, the 30 day revocation period is not a bar to their claim. In that regard, the Court notes that while a particular statute may not be facially unconstitutional, its application to a unique set of facts or circumstances may result in a deprivation of a constitutionally protected right. It is entirely possible to deprive a person of due process of law by the application of an otherwise valid statute. New rochelle v. Echo Bay Corp., 268 App.Div. 182, 49 N.Y.S.2d 673, 679 (2nd Dep't 1944), aff'd, 294 N.Y. 678, cert.den. 326 U.S. 720; Little v. Streater, 452 U.S. 1, 101 S.Ct. 2202 (1981). As was stated by the United States Supreme Court in Little v. Streater, supra, 101 S.Ct. at p. 2210:

> "'a statute may be constitutionally invalid as applied when it operates to deprive an individual of a

> protected right although its general validity . . . is beyond question. Boddie v. Connecticut, 401 U.S. 379. Thus, (a statute) . . ., valid on its face, may offend due process because it operates to forclose a particular party's opportunity to be heard'".

Thus, the question is not whether Section 115-b is per se unconstitutional due to its, inter alia, lack of notice provisions, but whether the application of Section 115-b to the parents in this case resulted in a denial of due process of law for Warren and Christine Kosher.

Due process of law, be it procedural or substantive, is a flexible notion which varies with the subject matter of the action and the necessities of the situation. Hudson Tire Mart v. Aetna Ins. Co., 518 F.2d 671 (2d Circuit 1975); Walker v. Mancusi, 467 F.2d 51 (2d Circuit 1972). At a minimum, the concept envisions that a person will not be deprived of a legitimate property or

personal right without adequate notice of the possibility of such deprivation. U.S. v. Wood, Wire and Metal Lathers, Local 46, 471 F.2d 401, cert. den. 412 U.S. 939.

In the present case, the Koshers believed that their written adoption consent under Section 115-b was "tentative", and that its irrevocability would be achieved only at the time they appeared before the Court (that hearing was scheduled for March 1, 1984). This belief is well validated by the factual sequence surrounding the execution of the written adoption consents, and the unique language of the extrajudicial consent form as discussed at pages 6 and 7, supra. Both consent forms were given to the Koshers at the same time, and they were asked to execute both. The judicial consent form provided that it became irrevocable when signed before a judge.

The extrajudicial consent form stated that "in the event Consent is not executed before a Judge of the Family Court . . . then . . . this consent shall become irrevocable thirty days after the commencement of the adoption proceeding . . .".

Presumably then, if consent is given before a Family Court Judge, the thirty day provision mentioned in the extrajudicial consent form would not be applicable. The Koshers knew that in their case, consent was to be given before a judge. They were waiting for their Court date.

Curiously, the aforementioned Court appearance for the natural parents was scheduled for March 1, 1984, by the adoption bureau of this Court. Considering the relevant dates herein, the parents were essentially being asked to come into Court on March 1, 1984, to

give their consent to an adoption at a time when their prior extrajudicial consent had already technically become irrevocable under Section 115-b. This is nothing short of absurd. One could imagine the following hypothetical colloguy at that time:

Court: Folks, you're here in Court to give your consent to the adoption of your child.

Parents: Judge, we've changed our mind. We can't go through with it.

Court: Well, too bad, your consent was irrevocable months ago.

Parents: Then why were we asked to come to Court?

Under the circumstances, and considering the evidence presented, the Kosher's claim that they thought their consent to be tentative, or preliminary, is entirely plausable. They believed that they were able to revoke their consent at any time prior to their

appearance before the Court. That belief was induced by the forms and procedures used by the adoption bureau of the Family Court of Suffolk County, plus the other circumstances in the case.

The Koshers were lulled into a false sense of security. Laboring under the impression that they had until the Court date to change their minds, they postponed focusing on the hard reality of the situation. As Mrs. Kosher testified, she viewed the March 1, 1984, date as a "door". If she and her husband passed through that door, they would never again be able to reclaim their daughter. But until that time, their options remained open. That Mrs. Kosher fully believed that to be so is evidenced by the fact that she forced herself to visit a school for Down's Syndrome Children, and otherwise learn about the disability, immediately prior to the scheduled Court

appearance. That visit, and the information obtained are what crystalized the Koshers' decision to revoke their consent. They thought, although their decision was made at the eleventh hour, that it was timely. The application of Section 115-b so as to make their revocation effort untimely, deprives the Koshers of due process of law.

Having found a violation of due process, the Court must endeavor to fashion an oppropriate remedy. Cf. Hills v. Gautreawx, 425 U.S. 284, 96 S.Ct. 1538, 1544 (1976) ("Once a constitutional violation is found, a federal Court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation"). In the case at bar, the remedy is found in affording the Koshers a "best interests" hearing. This will place them in the position that they would have been but

for the due process violation. The Court, therefore, deems the natural parents' February 29, 1984, revocation notice to be effective, irrespective of the passage of time after the adoption petition was filed.

CONCLUSION

In sum, the Court is not finding that Domestic Relations Law Section 115-b is facially invalid, nor am I suggesting that the Koshers' extrajudicial adoption consent is void ab initio because of any fundamental infirmity. However, the Court does find that the extrajudicial consent procedures as applied to the Koshers essentially deprived them of their right to unilaterally revoke their consent and obtain a custody hearing pursuant to Section 115-b. The peculiar language of the extrajudicial consent form signed by them (which, as explained previously, differs from that in Matter

of Daniel C., supra), viewed in conjunction with the other unique circumstances in this case, almost compels the erroneous conclusion reached by the natural parents. To remedy the resulting wrong caused to the Koshers, I have afforded them the benefit of the 30 day period that would have been operable had proper procedures been followed.

Accordingly, a "best interests" hearing pursuant to Section 115-b (3) (d) (ii) shall be conducted on the following dates, beginning at 11:30 a.m.: November 28, 29 and 30, and December 10, 11, 12, 13 and 14, 1984. Pending that hearing, and in accord with the parents' earlier request, the Koshers shall be afforded interim visitation with the child on alternate weekends from Saturday, 10:00 a.m. to Sunday, 5:00 p.m., away from the Stamatis residence, commencing the first weekend following receipt of this

decision/order.

This is the decision and order of the Court.

Date: Hauppauge
24 September 84

E N T E R

s Denis R. Hurley
J. F. C.

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the matter of the Adoption

of SARAH KOSHER

Adoptive Child

By HURLEY J.
Dated 7 November 1984
Docket #A-25-84

Katherine Thompson, Esq.
Attorney for Natural Parents
9 West 44th Street
Suite 400
New York, New York 10017

Frederick J. McGovern, Esq.
Attorney for Adoptive Parents
120 Broadway
New York, New York 10005

INTRODUCTION

This case involves a private placement adoption proceeding, and the natural parents' efforts to revoke their extrajudicial adoption consent so that their child may returned to them.

By way of procedure, it was agreed that the hearing would be bifurcated. At

the conclusion of the first part of the hearing, the Court, by decision dated September 18, 1984, held that the natural parents were entitled to a "best interest" hearing, pursuant to Domestic Relations Law Section 115-b, 3(d). That hearing, constituting the second part of the bifurcated proceeding, extended from October 5th to October 29th, 1984, at the confusion of which decision was reserved.

The question now to be resolved is "whether the best interests of the child will be promoted by the return of the child to the parents [viz. Warren and Christine Kosher], or by the adoption of the child by the adoptive parents [viz. Timmy and Lisa Stamatis] . . . " . Subdivision (d) (ii) of Domestic Relations Law Section 115-b, 3.

Significantly, the Koshers, even though they are the birth parents, enter the best interest hearing "on equal

footing" with the Stamatises for subervison (d) (v) of Domestic Relations Law Section 115-b, 3 provides:

> In such proceeding the parent or parents who consented to such adoption shall have no right to the custody of the child superior to that of the adoptive parents, notwithstanding that the parent or parents who consented to the adoption are fit, competent and able to duly maintain, support and educated the child. The custody of such child shall be awarded solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular custodial disposition.

Although the hearing is the product of statute, the statute unfortunately is essentially silent on the ground rules to be followed. Who shall be designated as the petitioner, and who the respondent? What is the standard of proof to be employed, and who bears the burden?

For both parts of the present bifurcated hearing, the natural parents

were designated as the petitioners. As to the first phase of the hearing dealing with the Koshers' attack on their extrajudicial consent, they made the claims so clearly they should carry the burden of proof. For purposes of continuity, the Koshers were also named as the petitioners for the second, or "best interest" phase of the hearing. Consequently they "opened" and "closed" the hearing consistent with the trial procedure set forth in CPLR Rule 4016. Nonetheless, although perhaps it is merely a matter of semantics, I did not place the burden on the natural parents to establish that they are more fit than the Stamatises to raise Sarah. Rather I treated the parties as being on "equal footing", with each charged with the responsibility of trying to establish that the best interests of the child dictates a finding in their favor. The

standard of proof employed was a fair preponderance of the credible evidence.

Three additional preliminary matters will be discussed before proceeding to the merits of the case, to wit: (1) the incorporation of certain testimony from the first phase of the bifurcated hearing into the present best interest phase of the hearing (2) the April 19, 1984, stipulation between the parties wherein it was agreed, inter alia, . . . "that the fact that the natural parents are going to continue to be separated from the child [during the pendency of the hearing] will not be used as an argument . . . (or) reason [by the adoptive parents] for the child not being returned to the natural parent . . . ", and (3) the applicability, if any, of Matter of Male Infant L., 1 N.Y.2d 420 (1984) to the present case.

Among the witnesses who testified during the first part of the hearing were the following: Warren and Christine Kosher, Bruce Regenstreich, Ira London, Anthony Angelo, M.D., Freda Stimmel and Ellen Woodward. those witnesses provided information to the Court bearing on the natural parents' wistressed state of mind following Sarah's birth, and the concomitant effect on their decision to release the child for adoption. Rather than the Koshers recalling each of those witnesses for the best interest hearing, it was stipulated that their testimony would be incorporated by reference into the present phase of the proceeding. Parenthetically, counsel for the Stamatises contended that the testimony was irrelevant and highly prejudicial as likely to invoke undue sympathy for the natural parents. When those objections to admissibility were overruled, he then

stipulated to the procedure outlined above. As a result, the Court has considered the testimony of those witnesses, as well as the testimony elicited at the best interest hearing in reaching its decision.

The last preliminary matters to be discussed are the stipulation of August 19, 1984, and the relevance, if any, that the Court of Appeals' decision in Matter of Male Infant L., 61 N.Y.2d 420 (1984) has to the case at bar. The two issues are related. In both instances the natural parents seek to "freeze" the best interest inquiry in time, so that delays attributable solely to the litigation will not be able to their detriment as the noncustodial parents. They contend, inter alia, that all evidence concerning Sarah's attachment to the Stamatises should be determined as of April 19, 1984, (pursuant to the stipulation), or

as of February 28, 1984, i.e. the date the Koshers executed their revocation of consent to Sarah's adoption (pursuant to the rationale of Matter of Male Infant L., supra).

Usually a stipulation previously placed on the record by counsel is not subject to dispute. However in the present case such a dispute arose, in part due to the fact that the Stamatises changed attornerys after the April 19, 1984, stipulation, and in part because the stipulation lends itself to numerous interpretations. In any event, when the disagreement became apparent at the beginning of the best interest hearing, the Court, in the presence of counsel, had the relevant portion of the April 19th proceedings read by the Court reporter. Clearly a stipulation was reached, the core which was quoted previously. That the natural parents

should not "lose ground" in their efforts to obtain the return of Sarah because of time consumed in litigation makes sense, particularly in view of the stipulation. Otherwise in a case such as this, each passing day would benefit the adoptive parents as the custody factors of "continuity" and "stability" in the child's life are further solidified, notwithstanding the natural parents' efforts to regain custody. In an effort to honor both the stipulation, and my overriding duty to the child, I froze the hearing concerning the infant's so called "bonding" to the adoptive parents as of April 19, 1984. No such time limitation, however, was imposed on offers of evidence pertaining to Sarah's current needs, care, routine, schooling, therapy, and present physical and mental condition.

The natural parents also urged that, independent of the stipulation, the best interest hearing should not include evidence of stability and continuity which postdates February 28, 1984. As mentioned previously, that was the date they revoked their consent and commenced their struggle for the return of Sarah. The case of Matter of Male Infant L., supra, is cited in support of that position, including the following excerpt from the decision:

> While it is true in the instant case that the child has not been in his mother's custody since birth almost four years ago, and has remained with the respondents for that entire period, it is nonetheless also true that petitioner requested her infant's return within three weeks of his birth and has persisted since that time in seeking to regain custody, as well as visiting the child regularly since she arrived in New York City. Indeed, to the extent that there exists a "disruption of custody over an extended period of time" for reasons outside petitioner's control . . . . When in a case such as this, the separation between the natural

> parent and child is not in any way attributable to a lack of interest or concern for the parental role, that separation does not amount to an extraordinary circumstance and, indeed, deserves little significant . . . . Nor is it of much consequence that provisional custody was gained by the respondents with the natural parent's consent. "Instead, [a] change of mind is to be accorded great sympathy, and, in a proper case, encouragement and favorable action."

61 N.Y.2d at pp. 428-29.

At first reading, the case does seem to lend support to the natural parents' position. But closer scrutiny indicates that the holding in Matter of Male Infant L., supra, is inapposite. That case involved a natural mother's efforts to recover her child from foster parents. The question was whether the almost four years that the child was with the foster parents - all but three weeks of which accumulated after the mother sought her child's return - constituted "extraordinary circumstances" sufficient

to destroy the natural mother's superior right to the child, thereby requiring that a best interest hearing be held. Judge Jason, writing for the Court of Appeals, answered the question in the negative, and concluded that "(c)onsequently, the question of best interest does not arise and the natural parents must be awarded custody". Id. at p. 429.

The superior right that the Koshers had to Sarah's custody (People exrel. Kropp v. Shepsky, 305 N.Y. 465, 468 (1953), was lost when they signed and tendered the extrajudicial consent form for her adoption. No threshold of extraordinary circumstances, or other precondition, had to be met to activate the best interest hearing as was the case in Matter of Male Infant L., supra; the holding of such a hearing was mandated by Domestic Relations Law Section 115-b, 3 (d).

In sum, Matter of Male Infant L., supra, does not, by implication or otherwise, indicated that the present best interest hearing should have exended post February 28, 1984, evidence of stability and continuity.

Having disucssed the procedures employed during the hearing, attention will now be directed to the substance of the case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

To determine whether Sarah's best interest calls for her to remain with the Stamatises, or to be returned to the Koshers, I placed the evidence into categories to provide some type of structure for the necessary comparative analysis. Thereafter I considered the results of that process, in connection with totality of all circumstances, and concluded that "the best interests of the child will be served by adoption of the

child by the "adoptive parents", Lisa and Timmy Stamatis. Subdivision (d) (iv) of Domestic Relations Law Section 115- (b), 3.

The factors considered, to be addressed seriatim, included the following: financial status; character; mental and physical health of the parties involved; ability to provide for the educational, physical and emotional needs of the child; support available to parents from extended family members; continuity and stability; and the capacity and disposition of the parties involved to accept the child, with her significant limitations, and provide the love so necessary for her development.

Financial Status

Warren Kosher is a lawyer who served as an assistant district attorney in Brooklyn, and then as counsel in the New York City Mayor's Office, before becoming

partner in a three man Manhattan firm approximately three years ago.

In 1983, he earned a net income of approximately $50,000.00. The net income figure for the first six months of this year was $40,000.00, and he anticipates an income for the entire year in excess of $70,000.00. The law partnership is in the process of acquiring a $350,000.00 brownstone for use as a new law office.

Mr. Kosher, who testified at both phases of the bifurcated hearing as did his wife, is a well educated, bright, ambitious 34 year old lawyer. His income will almost certainly increase substantially in the years ahead.

Christine Kosher is 33 years old, and has been married to Warren for 11 years. She has a Bachelors of Science degree in education, plus 21 graduate school credits. Prior to Sarah's birth, she had been employed both as a teacher,

and as an executive of a major retail establishment.

She is expecting the birth of their third child, and is presently on maternity leave from her part time teaching position with the Berkley School. Prior to the beginning of her leave, she worked an average of 12 hours a week, earning between $6,000.00 to $8,000.00 per year. Should Sarah be returned to her and her husband, she intends to relinquish any opportunities to work outside the home.

The Koshers purchased a home in Syosset in 1979. Its current market value is in the $190,000.00 to $200,000.00 range, and is subject to a $57,000.00 mortgage. The house is located on a one-half acre plot, and although it only has three bedrooms, a fourth would be added if Sarah is returned to them.

In sum, the Koshers are an upwardly mobile young professional couple, who presently, and presumably in the future, will be able to provide the basics, plus luxuries, for their family members.

The Stamatis, on the other hand, are of modest means, and likely to remain so. They are more family, than career oriented.

Mr. Stamatis is 25 years old, a high school graduate, and also a graduate of a two year program in court stenography. However the trade that he prefers, and practices is that of a waiter. He has been so employed for the last four years at the Harbor Side Restaurant in Patchogue. His net income from salary, or "shift pay", plus reported tips is $225.00 to $240.00 per week. He has no other source of income.

Mrs. Stamatis is 23 years of age. She, like her husband, is a high school

graduate and a trained court stenographer. In addition, she has 44 credits from Suffolk County Community College where she earned a 3.9 average out of a possible 4.0. She has taken no courses since December 1983, and has no present plans to return to school. She has elected to devote her full efforts at this time to her family, consisting of her husband, Sarah and Toby. Toby is a 10 month old child with Downs Syndrome, who was adopted by the Stamatises in December 1983.

The Stamatises live in an attractive residential area, known as the Strathmore section of Coram. The home has 4 bedrooms, one of which is Sarah's. There is a $22,400.00 mortgage on their home, which has a current market value in excess of $90,000.00. Prior to the present lawsuit, they had a $13,000.00 savings account, and no debts other than

their mortgage and a few remaining car payments.

The Stamatises receive $322.24 per month for Sarah from the Social Security Administration because of her disability, and $240.00 per month for Toby. In addition, Medicaid benefits are available for both children. It should be noted that the Stamatises decided to adopt handicapped youngsters before they were aware that children such as Sarah are entitled to certain disability benefits. This observation is being made to dispel any notion that the Stamatises sought to adopt Sarah for financial reasons. As the trier of fact, I find that the adoptive parents' decision was made independent of the existence of disability benefits for the child.

In conclusion, the financial status of the Koshers-present prospective-far exceeds that of the Stamatises. However

the adoptive parents have encountered no financial difficulties thus far in caring for Sarah. Should the future place increased demands on their limited financial resources, I believe that the Stamatises shall readily meet the challenge. During the course of their testimony, both impressed me as intelligent, hard working people who will do whatever is necessary to meet the needs of Sarah, including her financial needs, in the years ahead.

Character

Christine Kosher, Warren Kosher, Lisa Stamatis and Timmy Stamatis are fine people, each possessing the positive character traits that a Court looks for in custody disputes and too often fails to find. But for the uniqueness of Sarah, there would be no legitimate way to distinguish on a characher basis between the two couples. But because of

Sarah, such a distinction may readily be drawn. The Stamatises are, as stated by their attorney during his summation, "a couple apart". There is something in their makeup which caused them to embrace a severely handicapped child, i.e. the type of child that most couples pray they never will have.

By way of contrast, the Koshers were traumatized when initially confronted by Sarah's condition, leading to their decision to place her for adoption. Only after psychological counseling and considerable reflection did they seek her return.

Mental and Physical Health of the Parties

Each of the four parties is in excellent health, free of any physical or mental infirmities-past or present.

Ability to Provide for the Education, Physical and Emotional Needs of the Child

Much of the trial was devoted to the quesiton of which of two education programs for handicapped infants would better address Sarah's needs. The Koshers maintain that the Downs syndrome School in Bellmore is the more appropriate school, and testified that if Sarah is returned to them, she will be immediately enrolled in their infant program. the Stamatises support the BOCES II Infant Program at the North Country Learning Center, which is presently providing services to the child.

Each program seems well suited to meet the special educational needs of Downs Syndrom children, including their needs for specialized speech and physical therapy. Which program is generally better is subject to endless debate, for the anser depends in large measure on whether you accept the "home based"

philosophy of BOCES II, or the "center based" approach of the Downs Syndrome School. With respect to the present case, suffice it to say that Sarah has progressed satisfactorily in the BOCES II program. One of the reasons for that is the adoptive parents' participation. Between the home visits by the BOCES teachers and therapists, the parents are required to work with the child on a daily basis. The Stamatises performed this function-together-in an exemplary fashion according to the BOCES personnel who testified at the hearing. In short, Sarah's educational and therapy needs have been met by the Stamatises.

Whether the Koshers, working in conjunction with the Downs Syndrome School, would have better satisfied those needs had Sarah been in their care, is of course, problematical.

Under the umbrella of "physical needs" I have not only considered Sarah's previously discussed physical therapy requirements, and the need for food, clothing and shelter, but also questions pertaining to her medical care.

Little need be said concerning the child's basis needs. She has been fed, clothed and generally well cared for while under the Stamatises' roof. If Sarah had been with the Koshers for the the last eleven months, surely similar superior basic care would have been furnished.

Attention is now directed to Sarah'a medical needs, and to the ability of the parents involved to provide the needed care.

Downs Syndrome children are more subject than children in the general population to a variety of ailments including cardiac problems, hearing and

visual problems, upper respiratory difficulties, hypothyroidism and seizure disorders. Although they are more prone to such problems, it would be a mistake to conclude (except for the fairly common upper respiratory problems) that the average Down Syndrome child has one or more of the foregoing disabilities. That is not the case. For instance, few have seizure disorders. Unfortunately, Sarah is one of the few. She had her first grand mal seizure on May 30, 1984, and has had seizures intermittently since that time, with the last one occurring on October 1st.

During the course of the trial it was suggested that this condition is a factor weighing against a transfer of Sarah's custody to her natural parents for they lack experience in such matters. Their inexperience is a fact, but it does

not follow that this would somehow detract from their ability to care for Sarah.

No special training is required for a parent to assist a child suffering a seizure. Mr. Stamatis testified that a parent confronted with such a situation need only use "common sense" to respond appropriately. I think that may be an oversimplication, but it is apparent from the testimony of the Stamatises and two of the doctors that testified, that brief instructions would permit the Koshers to handle such episodes.

When a seizure strikes, it must be permitted to run its course. The only aid that a caretaker may provide is to assure that the child's air passage is clear. Sarah's condition is treated with phenobarbital, which is given to the child in her cereal twice a day. In conclusion of this point, I find that the

Koshers would be able to respond appropriately to a seizure episode, and to administer the required medication for the condition if Sarah were placed in their care.

The natural parents maintain that the Stamatises have not been sufficiently attentive to Sarah's medical needs as a Downs Syndrome child. They point to the fact that, for example, the child has not had specialized testing to determine whether she has a deficiency in hearing or sight. Yet, although Downs Syndrome childrn are more likley than nonhandicapped children to have such problems, this does not mean that a reasonable parent should necessarily subject the child to a battery of tests to rule out all possibilities. Sarah is a generally healthy baby, but for her seizures disorder. She has shown no symptoms to the Stamatises, or the

numerous doctors that have examined her, to warrant the testing that the Koshers claim should have been conducted.

I reject the argument that Sarah's medical needs have not been properly addressed by the adoptive parents. Both with respect to her general medical requirements as a developing infant, and the requirements pertaining to her seizure disorder, the Stamatises have done everything that could be reasonably expected of them. Given the opportunity, I believe the Koshers would have likewise satisfied the child'e medical requirements.

Let us now consider the ability of the natural and adoptive parents to provide for Sarah's emotional needs.

Pivotal to Sarah's emotional development and well being is her acceptance-as she is and will be-by her parents. The Stamatises, as a "couple

apart", have demonstrated this ability; the Koshers have not. This point will be discussed at length subsequently.

Before concluding the discussion of the comparative ability of the parties to care for the educational, physical and emotional needs of Sarah, brief mention will be made of their respective parenting skills.

The Koshers have a four year old son, Matthew. By all accounts, they have done a fine job with the boy. Parenthetically Matthew, and the Kosher's yet unborn child, would serve as positive role models for Sarah. That the Koshers are good parents has been established, although their experience with handicapped children is nonexistant.

The Stamatises, on the other hand, have direct parenting experience with Sarah and Toby, plus experience gained through involvement in the foster care

activities of Lisa's mother, Geraldine Knecht. Mrs. Knecht was a licensed foster care mother from 1967 to 1983. In that capacity, she had numerous foster children in her home, including Dawn, a Downs Syndrome 9 year old, who lived with Mrs. Knecht from February 1983, to December 1983. Both Lisa and Timmy Stamatis had almost daily contact with Dawn while she was in the Knecht home, and assisted with her care.

The Stamatises will be co-caretakers of Sarah. In the Kosher household, however, it is agreed that Mrs. Kosher is the primary caretaker due to Mr. Kosher's demanding work schedule.

By way of summary, both the natural and adoptive parents are fully capable of providing for Sarah's educational and physical needs. However, the Stamatises are better able to provide an appropriate setting for her emotional growth.

Support Available to Parents From Extended Family Members

Mrs. Knecht, because of her foster care experience, is an available resource to her daughter and son-in-law. She provides support to the Stamatises by serving as a babysitter and otherwise assisting with Sarah's care when asked. She visits the Stamatises almost daily. But extended family "support" for parents of a handicapped child is multifaceted, and extends beyond the giving of direct practical aid. It embraces acceptance of the parents' situation, and providing them with emotional support. Mrs. Knecht provides that also, as does the rest of the Stamatis and Knecht families. By way of illustration, when the Stamatises learned from Janet marches that they, in the words of Lisa "had a daughter", a "whole crew of family members" went shopping for the infant. Sarah's arrival

at the Stamatis home was followed by two large family parties within the span of a week. The families of Lisa and Timmy "stand behind them", and in the long run that might prove to be the most valuable extended family support of all.

The evidence indicates that the families of Warren and Christine Kosher would be supportive if Sarah were returned to them. But that support, I suspect, from the evidence, would be based on their love for Warren and Christine, not because they necessarily understand, or accept their decision to try to regain custody of Sarah. Support so predicated is not as sound as that available to the Stamatises.

Continuity and Stability

The above factors were considered, consistent with the previously discussed stipulation. Bonding evidence was limited to a termination date of April

19, 1984. Evidence as to the effect that a transfer of custody would have produced on the child's educational and therapy routines, as well as her medical care, was not so limited, current information being received as of the dates the witnessess testified. A change of custody would not have any significant degree. Consequently, the usually significant custody factors of a "stability" and "continuity" played little part in the Court's decision to leave the infant with her adoptive parents.

Capacity to Accept, and Love, the Child

That the Stamatises are totally accepting of Sarah, with her limitations, has been clearly established. They actively sought to adopt a Down Syndrome child. When they learned that Sarah was available, they rejoiced in their good fortune. Sarah's arrival in their home

was a momentous occasion, preceded by a shopping spree, and followed by family parties and the sending of birth announcements heralding the arrival of their "gift from heaven", to use Lisa's terminology.

The Stamatises' decision to adopt a child such as Sarah was reached years prior to November 1983, and indeed was first discussed early in their protracted courtship. It was a decision based on considerable thought, not the product of whim. As Mrs. Stamatis explained to Mrs. Marchese in September 1983, she and her husband were prepared to make a "life long commitment". Sarah is the beneficiary of that commitment. She is fully accepted and loved within the Stamatis household.

Whether the Koshers would be capable of providing a comparable environment for Sarah is doubtful, although I am sure

they would try to do so notwithstanding their initial decision to place the child for adoption.

CONCLUSION

By a fair preponderance of the credible evidence, I have concluded that the best interests of Sarah will be served by her adoption by Lisa and Timmy Stamatis. Consequently no force or effect shall be afforded to the notice of revocation of consent filed by the Koshers. See subdivision (d) (iv) of Domestic Relations Law Section 115-b, 3. With respect to Domestic Relations Law Section 115-b, the Court rejects the natural parents' constitutional attack on the statute for the reasons stated in its September 18, 1984, decision. That determination includes the attack on subsection (3) (d) (v) of the statute, which is claimed to be constitutionally defective in that it destroys what

otherwise would be the natural parents' superior right to their child.

The above constitutes the order and decision of this Court.

A-205

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge,
Presiding

2 No. 579
In the Matter of Sarah K.
(Anonymous).
Timmy S. (Anonymous) et al.,
Appellants,
Warren K. (Anonymous) et al.,
Respondent.
Robert Abrams, Attorney General,
Intervenor-Appellant.

The appellant(s) in the above entitled appeal appeared by Frederick J. Magovern, Esq.; the respondent(s) appeared by Sherman, Thompson, Halpin, Esqs., Intervenor-Appellant appeared by Hon. Robert Abrams, Attorney General and Harris, Beach, Wilcox, Rubin and Levey, Esqs. and Frank A. Gulotta, Esq. appeared as amici curiae.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, and petition for adoption granted. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Jasen,

Meyer, Simons, Alexander and Titone concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Family Court, Suffolk County, there to be proceed upon according to law:

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s Donald M. Sheraw
Donald M. Sheraw,
Clerk of the Court

Court of Appeals, Clerk's Office,
Albany, November 14, 1985

STATUTE INVOLVED

New York Domestic Relations Law § 115-b. Special Provisions Relating to Consents in Private-Placement Adoptions.

1. If a duly executed and acknowledged consent to a private-placement adoption shall so recite, no action or proceeding may be maintained by the consenting parent for the custody of the child to be adopted, and no such consent shall be revoked by such parent if:

(a) The consent sets forth the name and address of the court in which the adoption proceeding is to be commenced; and

(b) A copy of such consent was given to such parent upon the execution thereof; and

(c) The consent was executed or acknowledged before a judge or surrogate of the court in which the adoption proceeding is to be commenced and such

consent states that it shall become irrevocable upon such execution or acknowledgment; or

(d) The consent was not executed or acknowledged before a judge or surrogate of the court in which the adoption proceeding is to be commenced, in which case,

(i) Such consent shall, if it shall so state, become irrevocable thirty days after the commencement of the adoption proceeding unless written notice of revocation thereof shall have been received by the Court within said thirty days.

(ii) Notwithstanding that such written notice shall have been received within said thirty days, the notice of revocation shall be given effect only if the adoptive parents fail to oppose such revocation, as provided in subdivision three of this section, or, if

they oppose such revocation and the court as provided in subdivision three of this section shall have determined that the best interests of the child will be promoted by giving force and effect to such revocation.

2. At the time that a person appears before a judge or surrogate to execute or acknowledge a consent to adoption, the judge or surrogate shall inform such person of the consequences of such act pursuant to the provisions of this section.

3. (a) A parent may revoke his consent to adoption only if it has not become irrevocable under the provisions of this section and only by giving notice, in writing, of such act to the court in which the adoption proceeding has been or is to be commenced. Such notice shall set forth the address of the parent and may, in addition, set forth

the name and address of the attorney for the parent.

(b) If, at the time of the filing of the petition for adoption, or within thirty days thereafter, the court has received or shall receive such notice of revocation, the court shall promptly notify the adoptive parents, by notice in writing to them and to their attorney, of the receipt by the court of such notice of revocation.

(i) Such notice to the adoptive parents shall set forth that unless, within ten days from the date of such notice the court shall receive from the adoptive parent notice, in writing, of their intention to oppose such revocation by the parents, the adoption proceeding will be dismissed and that, in case of such dismissal, the court will send to the parents and to the adoptive parents the notice of dismissal, as

provided in paragraph (c) of this subdivision.

(ii) Such notice to the adoptive parents shall further set forth that if, within ten days from the date of such notice, the court shall receive from the adoptive parents notice, in writing of their intention to oppose such revocation by the parents, the court will, upon notice to the parents and to the adoptive parents, proceed, as provided in paragraph (d) of this subdivision, to a determination of whether such notice of revocation by the parents shall be given force and effect and to a determination of what disposition shall be made of the custody of the child.

(c) If the adoption proceeding is dismissed pursuant to the provisions of paragraph (b) of this subdivision,

(i) Written notice of such dismissal shall forthwith be sent to the

parent or, if represented by attorney, to the attorney for the parent, and to the attorney for the adoptive parents.

(ii) Such notice of dismissal shall set forth the name and address of the parent, the name and address of the attorney for the parent, if any, the name and address of the attorney for the adoptive parents.

(iii) Such notice of dismissal shall further set forth that if the child is not returned to the custody of the parent within ten days from the date of such notice of dismissal, the court will forthwith upon request, in writing, by the parent or by the attorney for the parent, furnish to said parent or attorney so requesting, the names and address of the adoptive parents.

(iv) Such notice of dismissal shall further state that, in the event the custody of the child is not

returned to the parent by the adoptive parents upon request therefor, a proceeding to obtain custody may be instituted by the parent in the Supreme Court or the Family Court.

(d) If, pursuant to the provisions of paragraph (b) of this subdivision, the adoptive parents shall give notice of their intention to oppose the revocation of the parent's consent,

(i) The court shall promptly notify, in writing, the parent or the attorney for the parent, if any shall have been named in the notice of revocation, and the attorney for the adoptive parents, that the court will, upon the date specified in such notice by the court, or as soon thereafter as the parties may be heard pursuant to this paragraph, hear and determine whether revocation of the consent of the parent shall be permitted and, in any event,

hear and determine what disposition should be made with respect to the custody of the child.

(ii) The court shall, upon the date specified, take proof as to whether the best interest of the child will be promoted by the return of the child to the parents, or by the adoption of the child be the adoptive parents, or by placement of the child with or without authority to consent to the adoption of the child, or by other disposition of the custody of the child.

(iii) If the Court shall determine that the best interests of the child will be served by returning custody of the child to the parent or by placement of the child with an authorized agency or by disposition other than adoption by the adoptive parents, the revocation of consent shall be given force and effect and the court shall make

such disposition of the custody of the child as will serve the best interests of the child.

(iv) If the court shall determine that the best interests of the child will be served by adoption of the child by the adoptive parents, the court shall enter an order denying any force and effect to the notice of revocation of consent and shall dispose of the custody of the child as if no such notice of revocation has been given by the parent.

(v) In such proceeding the parent or parents who consented to such adoption shall have no right to the custody of the child superior to that of the adoptive parents, notwithstanding that the parent or parents who consented to the adoption are fit, competent and able to duly maintain, support and educate the child. The custody of such child shall be awarded solely on the

basis of the best interest of the child, and there shall be no presumption that such interest will be promoted by any particular custodial disposition.

4. Nothing contained in this section shall limit or affect the power and authority of the court in an adoption proceeding, pursuant to the provisions of section one hundred sixteen of this title, to remove the child from the home of the adoptive parents, upon the ground that the welfare of the child requires such action, and thereupon to return the child to a natural parent or place the child with an authorized agency, or, in the case of a surrogate, transfer the child to the family court; nor shall this section bar actions or proceedings brought on the ground of fraud, duress or coercion in the execution or inducement of an adoption consent.